Wilcox
vs
Bentley
Ref. Otto 21-9
Petition
Interrogs.

Stong of 21.80.acq° by Dc
Motion to Dismiss
Mar 8. 80

12-256

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

36

No. 890. ~~536~~ 292

THE PEOPLES BANK OF BELLEVILLE, PLAINTIFF IN ERROR,

vs.

EDWARD F. WINSLOW AND JAMES H. WILSON, LATE PARTNERS AS WINSLOW & WILSON.

PHILO C. CALHOUN AND GEORGE OPDYKE, INTERPLEADERS.

In error to the Circuit Court of the United States for the Southern District of Illinois.

Filed 13th October, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 890.

THE PEOPLES BANK OF BELLEVILLE, PLAINTIFF IN ERROR,

vs.

EDWARD F. WINSLOW AND JAMES H. WILSON, LATE PARTNERS AS WINSLOW & WILSON.

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United States of America, ss:

1 THE PRESIDENT OF THE UNITED STATES—To the Judges of the Circuit Court of the United States for the Southern District of Illinois, Greeting:

Because in the records and proceedings, and also, in the rendition of the judgment of a plea, which is in the said Court, before you, between the Peoples' Bank of Belleville, Plaintiff, and Edward F. Winslow, and James H. Wilson, late partners, as Winslow & Wilson, Defendants, and Philo C. Calhoun and George Opdyke are Interpleaders, a manifest error hath happened, to the great damage of the said Peoples' Bank of Belleville, Plaintiff, as by its complaint appears. We being willing, that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, then under your seal, distinctly and openly, you send the Record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

2 Witness, the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, this 4th day of September, in the year of our Lord, eighteen hundred and seventy-seven, and of our Independence the one hundred and second year.

J. A. JONES,
Clerk U. S. Circuit Court, for the Southern District of Illinois.

Peoples' Bank of Belleville, Plaintiff in Error,
vs.
Calhoun & Opdyke, Defendants in Error.
} *Supreme Ct. of U. S.*

Filed September 4, 1877.

J. A. JONES, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

To George Opdyke and Philo C. Calhoun, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the southern district of Illinois, wherein the Peoples' Bank of Belleville is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, Hon. S. H. Treat, Judge of the District Court of the United States for the Southern District of Illinois, this 4th day of September,

in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

S. H. TREAT.

I hereby acknowledge service of the above citation this September 24th, 1877.

BLUFORD WILSON,
Solicitor for Interpleaders.

4 (Endorsed.)

The Peoples' Bank of Belleville,
vs.
George Opdyke and Philo C. Calhoun. } *Supreme Court United States.*

Pleas in the Circuit Court of the United States of America, for the Southern District of Illinois, held at the city of Springfield, in said District, before the Honorable Samuel H. Treat, District Judge of said District, and in the absence of the Honorable Thomas Drummond, Judge of the Seventh Judicial Circuit, *pro tempore* sole Judge of said Circuit Court, on Tuesday, the fourth day of September, at the June term of said Court, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

J. A. JONES, *Clerk.*

Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, late partners, under the firm name and style of Winslow & Wilson. } *Attachment.*

George Opdyke, and Philo C. Calhoun, interpleaders.

Southern District of Illinois.

Be it remembered that heretofore, to wit: On the twenty-third day of May, in the year of our Lord one thousand eight hundred and
5 seventy-six, came said parties by their attorneys, and filed in the clerk's office of said Court, a transcript of the papers filed, and proceedings thereon had in the Circuit Court of St. Clair county, Illinois, which said transcript is in the words and figures following, to wit:

State of Illinois, St. Clair county:

At a regular term of the Circuit Court, within and for the county of St. Clair, and State of Illinois, begun and held at the Court House, in the city of Belleville, in said county of St. Clair, on Monday, the seventeenth day of April, A. D. 1876, it being the third Monday of April, A. D. 1876, according to the act of the General Assembly, by the Hon. William H. Snyder, Judge of the 22nd Judicial Circuit of the State of Illinois, of which the said county of St. Clair forms a part, the following proceedings were had, to wit:

Present, Honorable WILLIAM H. SNYDER, Judge,
HERMANN G. WEBER, Sheriff,
CHARLES P. KNISPEL, State Attorney,
CHARLES BECKER, Clerk.

Affidavit for Attachment.

Affidavit. State of Illinois, St. Clair county:

Albert G. Badgley, being first duly sworn, says upon his oath that he is the agent of the Peoples' Bank of Belleville, that Edward
6 F. Winslow and James H. Wilson, late partners, under the name and style of Winslow & Wilson, are justly indebted to said bank after allowing all just credits and set-offs, in the sum of forty thousand and seven hundred and thirty-three dollars and thirty-three cents, as indorsers of two certain promissory notes, both executed by the St. Louis and Southeastern Railway Company (consolidated) to the order of said Winslow & Wilson, both indorsed by said Winslow & Wilson to said bank, each for twenty thousand dollars, and dated December 1st, 1873, and both payable two years after said date; that said Edward F. Winslow and James H. Wilson are both non-residents of the State of Illinois, the said Winslow residing at Cedar Rapids, in the State of Iowa, and the said Wilson at New York, in the State of New York. And further affiant saith not.

ALBERT G. BADGLEY.

Subscribed and sworn to before me, this 23rd day of March, 1876.

CHAS. BECKER, Clerk,
By GEORGE H. STOLBERG, D'y.

Filed March 23rd, 1876.

7 *Attachment Bond.*

State of Illinois, county of St. Clair:

Know all men by these presents, that we, the Peoples' Bank of Belleville, J. B. Rentchler, Charles W. Thomas, F. H. Pieper, William Maus, are held and firmly bound unto Edward F. Winslow and James H. Wilson, late partners, under the firm name of and style, Winslow & Wilson, in the penal sum of eighty-two thousand dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals, this twenty-third day of March, A. D. 1876. The condition of the above obligation is such, that whereas the above bounden Peoples' Bank of Belleville, hath on the day of the date hereof prayed an attachment out of the Circuit Court of said county at the suit of itself against the estate of the above-named Edward F. Winslow and James H. Wilson, late partners, under the firm name and style of Winslow & Wilson, for the sum of forty thousand, seven hundred and thirty-three 33-100 dollars, and the same being about to be sued out of said court, returnable on the third Monday of April next, to the term of the court then to be holden. Now if the said Peoples' Bank of Belleville shall prosecute his suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said
8 Winslow & Wilson all such costs of said suit, and such damages as shall be awarded against it, his heirs, executors, or adminis-

trators in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void, otherwise to remain in full force and effect.

THE PEOPLES' BANK OF BELLEVILLE. [SEAL]
By A. G. BADGLEY, *Cashier*, [SEAL]
J. B. RENTCHLER, [SEAL]
CHARLES W. THOMAS, [SEAL]
F. H. PIEPER, [SEAL]
WILLIAM MAUS. [SEAL]

Approved by me this 23rd day of March, 1876.

CHARLES BECKER, *Clerk.*

Filed March 23rd, 1876.

Attachment Writ.

State of Illinois, county of St. Clair:

The people of the State of Illinois—To the Sheriff of St. Clair county, Greeting:

Whereas, Albert G. Badgley, agent of the Peoples' Bank of Belleville, complained on oath before Charles Becker, clerk of the Circuit Court of St. Clair county, that Edward F. Winslow and James H.
9 Wilson, late partners, under the name and style of Winslow & Wilson, are justly indebted to the said Peoples' Bank of Belleville, to the amount of forty thousand, seven hundred and thirty-three 33-100 dollars, and oath having also been made that the said Edward F. Winslow and James H. Wilson are both non-residents of the State of Illinois, and the said Peoples' Bank of Belleville having given bond and security according to the directions of the act in such case made and provided—

We, therefore, command you that you attach so much of the estate, real and personal, of the said Edward F. Winslow and James H. Wilson as is to be found in your county, as shall be of value sufficient to satisfy the said debt and costs according to complaint, and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon according to law, at a court to be holden at Belleville, for the county of St. Clair, on the third Monday of April, 1876, so as to compel the said Edward F. Winslow and James H. Wilson to appear and answer to the complaint of the said Peoples' Bank of Belleville, and that you also summon as garnishee to be and appear at the said court on the said Monday of [April] next, then and there to answer to what may be objected against, when and where you shall make known to the said court, how you have executed this writ, and have you then and there this writ.

10 Witness, Charles Becker, clerk of said court, and the seal thereof hereunto affixed, at office, this 23rd day of March, A.
[SEAL] D. 1876.

CHAS. BECKER, *Clerk.*
By GEORGE H. STOLBERG, *Deputy.*

(Endorsement.)

Come to hand March 23rd, 1876, at 3.35 o'clock P. M.

H. G. WEBER, *Sheriff.*
By A. G. FLEISCHBEIN.

By virtue of the within writ of attachment, I have this day levied upon the following described property, situated in the county of St. Clair, and State of Illinois, to wit: All the right of way, being fifty feet on each side of the center or middle of the track of the railroad extending and running from the railway of the St. Louis and Southeastern Railway Company (consolidated) in section twenty-two, in township one north, range eight west, to the mill of Tiedemann and Co., in the northeast quarter of section thirty, township two north, range seven west, formerly known as the Belleville and O'Fallon railroad, together with all the railroad track, iron, spikes, ties, bridges, culverts, embankments, switches, frogs, and road bed now upon said right of way.

Witness my hand and seal, this twenty-third day of March, A. D. 1876.

HERMANN G. WEBER,
Sheriff of St. Clair County, Illinois.
By A. G. FLEISCHBEIN, *Deputy.*

Filed March 23, 1876, and recorded in levy book A, page 275.

Alias Writ of Attachment.

11 State of Illinois, county of St. Clair, *ss.*

The people of the State of Illinois—To the Sheriff of St. Clair county, Greeting:

Whereas, the Peoples' Bank of Belleville, by A. G. Badgley, its agent, complained on oath before Charles Becker, clerk of the Circuit Court of St. Clair county, that Edward F. Winslow and James H. Wilson, late partners, under the firm name and style of Winslow & Wilson, justly indebted to the said Peoples' Bank of Belleville, to the amount of forty thousand, seven hundred and thirty-three 33-100, dollars and oath having also been made that the said Edward F. Winslow and James H. Wilson, late partners, etc., are now residents of the State of Illinois, and the said Peoples' Bank of Belleville, having given bond and security according to the direction of the act in such case made and provided—

We, therefore, command you as heretofore that you attach so much of the estate, real and personal, of the said Edward F. Winslow and James H. Wilson, as is to be found in your county, as shall be of value sufficient to satisfy the said debt and costs according to complaint, and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a court to be holden at Belleville, for the county of St. Clair, on the third Monday of September, 1876, so as to compel the said Ed-
12 ward F. Winslow and James H. Wilson to appear and answer the complaint of the said Peoples' Bank of Belleville, and that you also summon the Belleville and O'Fallon Railroad Company as garnishee to be and appear at the said court on the said third Monday of September next, then and there to answer to what may be objected against it, when and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness, Charles Becker, clerk of said Court, and the seal thereof hereunto affixed at office the 28th day of April, A. D. 1876.

[SEAL] CHARLES BECKER, *Clerk.*
By GEORGE H. STOLBERG, *Deputy.*

(Endorsements.)

State of Illinois, St. Clair county, *ss.*

By virtue of the within writ I have this 28th day of April, A. D. 1876, levied upon the following described property, to wit: Certificate number 133, calling for six and one-half (6 1-2) shares of the Belleville Building and Loan Association, at one hundred dollars ($100.00) per share, held in the name of Laura B. Winslow, as the property of the within-named Edward F. Winslow.

H. G. WEBER,
Sheriff of St. Clair county.
By A. G. FLEISCHBEIN, *Deputy.*

Served by attaching the within described property April 28th, 1876, and delivering a true copy of this writ to Edward Abend, president of the Belleville and O'Fallon Railroad Company, as garnishee, May 1, 1876.

H. G. WEBER, *Sheriff.*
By A. G. FLEISCHBEIN, *Deputy.*

Filed May 1st, 1876.

Declaration.

State of Illinois, St. Clair county, *ss.*

In the St. Clair Circuit Court—To the April term, thereof, A. D. 1876. The Peoples' Bank of Belleville, plaintiff, by C. W. and E. L. Thomas, its attorneys, complains of E. F. Winslow and James H. Wilson, late partners, under the firm name and style of Winslow & Wilson, defendants, of a plea of trespass on the case, on promises, for that whereas the St. Louis and Southeastern Railway Company (consolidated) on the first day of December, A. D. 1873, at St. Louis, Mo., to wit: at the county aforesaid, made its two certain promissory notes of said date, and delivered the same to the defendants as such partners, and thereby then and there promised by one of said notes to pay two years after date thereof, to the order of the defendants, by the name and style of Winslow & Wilson, the sum of twenty thousand dollars for value received, at the bank of the plaintiff, and then and there promised by the other of said notes to pay two years after the date thereof to the order of the defendants, by the name and style of Winslow & Wilson, the sum of twenty thousand dollars for value received, at the bank of the plaintiff, and thereupon the defendants, on the day and year first aforesaid, by the name and style of Winslow & Wilson, there endorsed and delivered the said notes to the plaintiff. And although on the 4th day of December, A. D. 1875, the said notes became due the said St. Louis and Southeastern Railway Company (consolidated) did not nor would then, or before, or since that time, pay to the plaintiff the amount

of the said notes, or either of them, or any part of the same or either of them. And plaintiff avers that the day last aforesaid and ever since said day, the said company has been and that it is still insolvent, and that suit against the same as maker of said notes would have been and still would be entirely unavailing. By means whereof the defendants on the day last aforesaid having notice of the premises, then became liable to pay the plaintiff on request the amount of the said notes according to their tenor and effect, and being so liable, the defendants in consideration thereof then and there promised the plaintiff to pay it the amount of said notes according to their tenor and effect severally on request; yet the defendants though requested have not paid the said amount, or any part thereof, to the plaintiff, but refuses so to do, to the damage of the plaintiff of forty-two thousand dollars, and therefore it brings its suit, &c. By C. W. and E. L. THOMAS,

its Attorneys.

No. 492.

$20,000 00.

ST. LOUIS AND SOUTHEASTERN RAILWAY COMPANY (consolidated,)
ST. LOUIS, Mo., December 1st, 1873.

Two years after date we promise to pay to the order of Winslow & Wilson, twenty thousand and $\frac{x}{100}$ dollars value received at the Peoples' Bank, Belleville, Ills.

THE ST. LOUIS AND SOUTHEASTERN RAILWAY CO.,
(Consolidated.)

Due Dec. 1–4, 1875. By J. F. ALEXANDER, *Treasurer.*

No. 469.

$20,000 00.

ST. LOUIS AND SOUTHEASTERN RAILWAY COMPANY (consolidated,)
ST. LOUIS, Mo., December 1st, 1873.

Two days after date we promise to pay to the order of Winslow & Wilson twenty thousand $\frac{x}{100}$ dollars value received at the Peoples' Bank, Belleville, Ills.

THE ST. LOUIS AND SOUTHEASTERN RAILWAY CO.,
(Consolidated.)

Due Dec. 1–4, 1875. By J. F. ALEXANDER, *Treasurer.*

Filed April 7th, 1876.

Certificate of Clerk.

State of Illinois, St. Clair county, *ss:*

In the Circuit Court, April term, 1876.

Peoples' Bank of Belleville,
vs.
Edward F. Winslow *et al.* } *Attachment.*

Certificate of Clerk as to Mailing Notice.

I, Charles Becker, clerk of the Circuit Court within and for said county and State aforesaid, hereby certify that on the 24th day of March, A. D. 1876, in pursuance of the statute in such case made and

provided, and within ten days of the first publication of the notice in this cause, I mailed a copy of said notice to the following-named defendants, whose place of residence is stated in the affidavit of non-residence in the above-entitled cause, to wit: To Edward F. Winslow, to Cedar Rapids, Iowa, and to James H. Wilson, to New York city, New York.

Witness my hand and seal of the court, hereto affixed, this
17 14th day of April, A. D. 1876.

[SEAL] CHARLES BECKER, *Clerk*,
By G. H. STOLBERG, *Deputy*.

Notice of Publication and Certificate.

State of Illinois, St. Clair county, *ss:*

In the Circuit Court of said county, April term, A. D. 1876.

The Peoples' Bank of Belleville, *vs.* Edward F. Winslow and James H. Wilson, late partners, under the firm name and style of Winslow & Wilson.	*Attachment.* $40,733.33.

Notice is hereby given to the said Edward F. Winslow and James H. Wilson, that the said Peoples' Bank of Belleville has sued out of the Circuit Court of St. Clair county a writ of attachment against the estate of said Edward F. Winslow and James H. Wilson, late partners under the firm name and style of Winslow & Wilson, for the sum of $40,733.33, and also an affidavit that the said Edward F. Winslow and James H. Wilson, are non-residents of the State of Illinois, that the said writ of attachment has been levied by the sheriff of St.
18 Clair county, to whom it was directed, upon the estate of said defendants, and if the said defendants fail to appear in said Circuit Court on the first day of the next term thereof to be holden in the city of Belleville, on the third Monday of April, 1876, give bail and plead, within the time limited for their appearance in such case, judgment will be rendered against them, and the property so attached will be sold.

CHARLES BECKER,
Clerk of said Court.

BELLEVILLE, April 20th, 1876.

This is to certify that the above advertisement hereto annexed has been published in the BELLEVILLE ADVOCATE, a weekly newspaper, published and printed in Belleville, county of St. Clair, and State of Illinois, four weeks, the first insertion and publication having been made on the 24th day of March, 1876, and the last on the 14th day of April, 1876.

WESTERN PRINTING CO., *Publishers*.

[SEAL] JOHN WOODS, *Superintendent*.

Printers' fee, $7.50.

Filed May 11th, 1876.

Agreement.

State of Illinois, St. Clair county *ss.*

April term, 1876, Circuit Court.

Stipulation.

19 The Peoples' Bank of Belleville
vs.
Winslow & Wilson. } *Attachment.*

It is stipulated that on the 5th Monday of the term, or at any subsequent day of the term, this cause shall be removed to the proper United States Circuit Court, as by consent, petition and bond waived, and all defendants agree to file the record of the cause in the United States Circuit Court before the first day of the June term, A. D. 1876, defendants' pleas to be filed with record in U. S. C. C.

C. W. and E. L. THOMAS.
J. M. HAMILL,
Attorney for Defendants.

Filed April 27th, 1876.

Order of Court.

The Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, late partners, under the firm name and style of Winslow & Wilson. } *Attachment.*

On the second Friday of the term comes the plaintiff, by C. W. and E. L. Thomas, its attorneys, and the plaintiff makes proof of publication, by filing a copy of the notice of publication duly certified, the first publication having been made on the 24th day of March, 1876,
20 and the last on the 14th day of April, 1876, and the court orders that an alias writ of attachment issue to St. Clair county. And now on the fifth Monday of the term comes again the plaintiff, by its attorneys, and the defendants, by J. M. Hamill, Esq., their attorney, by consent of parties this cause is removed to the Circuit Court of the United States for the Southern District of Illinois, petition and bond being waived as per stipulation on file. It is, therefore, ordered by the Court that this cause be removed to the Circuit Court of the United States for the Southern District of Illinois; and that the Clerk of this Court certify a transcript of the papers and proceedings in this cause to said Court according to the statute in such case made and provided.

State of Illinois, county of St. Clair, *ss.*

I, Charles Becker, Clerk of the Circuit Court of St. Clair county, in the State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of the affidavit, bond, attachment writ, certificate of levy, alias attachment, declaration, certificate, clerk notice of publication,

agreement and order of Court, and that the same is a complete record in a certain cause lately pending in said Court, on the law side
21 thereof, wherein the Peoples' Bank of Belleville is plaintiff and Edward F. Winslow and James H. Wilson are defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Belleville, this 22d day of May, A. D. 1876.

[SEAL.] CHARLES BECKER, *Clerk.*

(Endorsed.)

Filed May 23d, 1876.

J. A. JONES, *Clerk.*

Afterwards, to-wit: on said twenty-third day of May, of the year aforesaid, came said defendants, Winslow and Wilson, by J. M. Hamill, Esq., their attorney, and filed in the Clerk's office of said Court their plea herein, which said plea is in the words and figures following, to-wit:

Plea.

United States of America, Southern District of Illinois.

In the United States Circuit Court for the Southern District of Illinois. To the June Term, A. D. 1876.

Edward F. Winslow and James H. Wilson, late partners, under the name and style of Winslow & Wilson,
agt.
Peoples' Bank of Belleville.
} *Attachment.*

And the defendants by J. M. Hamill, their attorney, come and defend the wrong and injury, when, etc., and say that they did not
22 promise in manner and form as the plaintiff has above thereof complained against them, and of this they put themselves upon the country, etc.

J. M. HAMILL,
Attorney for Defendants.

(Endorsed.)

Filed May 23d, A. D. 1876.

J. A. JONES, *Clerk.*

And afterwards, to-wit: on the seventh day of June, in the June Term of said Circuit Court of the United States, in the year last aforesaid, the following proceedings were had in said Court in said cause, and entered of record, to-wit:

Peoples' Bank of Belleville,
vs.
Edward F. Winslow *et al.*
} *Attachment.*

On motion of defendants, by B. Wilson, Esq., their attorney, this cause is set for hearing on Wednesday, the 5th day of July next.

Then afterwards, to-wit: on the twenty-first day of said June, in the term and year last aforesaid, the following further proceedings were had in said cause and entered of record, to-wit:

23 *Order for hearing.*

Peoples' Bank of Belleville,
vs.
Edward F. Winslow *et al.* } *Attachment.*

On motion of plaintiff, by Messrs. C. W. and E. L. Thomas, its attorneys, this cause is set for hearing on the 6th day of July next.

Now afterwards, to-wit: on the fifth day of July, in the term and year last aforesaid, the following further proceedings were had in said Court in said cause, and entered of record, to-wit:

Order of continuance and leave to Laura B. Winslow to interplead.

Peoples' Bank of Belleville,
vs.
Edward F. Winslow *et al.* } *Attachment.*

By consent of parties, by their attorneys, this cause is continued, with leave to Laura B. Winslow to interplead herein by the 1st day of November next.

Afterwards, to-wit: on the sixth day of November, of the year last aforesaid, came Laura B. Winslow, by J. M. Hamill, Esq., her attorney, and filed in the Clerk's office of said Court her interpleader herein, which said interpleader is in the words and figures following, to-wit:

24 *Interpleader of Laura B. Winslow.*

United States of America, Southern District of Illinois.

In the United States Circuit Court for the Southern District of Illinois. June Term, A. D. 1876.

The Peoples' Bank of Belleville,
vs.
Edward F. Winslow, late partners, under the name and style of Winslow & Wilson. } *Attachment.*

And Laura B. Winslow, by J. M. Hamill, her attorney, comes and interpleads according to the form of the Statute of the State of Illinois in such cases made and provided, and says that the goods and chattels, to-wit: Certificate numbered one hundred and thirty-three (133) of the Belleville Building and Loan Association for six and one-half shares of the paid-up capital stock of said Association, attached and seized by virtue of the said writ of attachment in this behalf, were at the time said shares of stock were so attached and seized, and still are, the property of the said Laura B. Winslow, and not the property of the said Edward F.

Winslow, as stated in said attachment writ. And this the said Laura B. Winslow is ready to verify; wherefore she prays judgment if her said goods and chattels ought to be detained by virtue of the said
25 writ, etc.

J. M. HAMILL,
Attorney for Laura B. Winslow.

State of Iowa, County of Linn.

Laura B. Winslow, the interpleader in the above attachment cause, being duly sworn, upon oath, says that her plea of interpleader hereunto annexed, is true in substance and in fact.

LAURA B. WINSLOW.

Subscribed and sworn to before me, a Notary Public in and for the county of Linn and State of Iowa, this 24th day of October, 1876.

Witness my hand and Notarial Seal, day and year last above written.

[L. S.] G. W. BEVER, *Notary Public.*

The State of Iowa, Linn county.

I, J. L. Crawford, Clerk of the District Court in and for said county (a court of record, using a seal of office, and having common law jurisdiction), do hereby certify that G. W. Bever, before whom the foregoing affidavit appears to have been made, was at the time of taking the same a legal acting Notary Public, within and for the county of Linn, duly commissioned and qualified and authorized to take acknowledg-
26 ments and administer oaths in said county, and that I am well acquainted with his handwriting, and verily believe the signature purporting to be his is genuine.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said Court at my office, in Marion, in said county of Linn, this 25th day of October, A. D. 1876.

[L. S.] J. L. CRAWFORD,
Clerk District Court.

(Endorsed.)

Filed November 6, 1876.

J. A. JONES, *Clerk.*

Order for hearing.

And afterwards, to-wit: on the fourteenth day of February, in the January Term of said Court, in the year of our Lord one thousand eight hundred and seventy-seven, the following further proceedings were had in said Court in said cause, and entered of record, to-wit:

Peoples' Bank of Belleville,
vs.
Edward F. Winslow *et al.* } *Attachment.*

By consent this cause is set for hearing on the 1st of March next.

Then afterwards, to-wit: on the fifteenth day of March, of the year last aforesaid, came Edward F. Winslow and James H. Wilson,
27 by Bluford Wilson, Esq., their attorney, and filed in the Clerk's office of said Court their interpleader herein, which said interpleader is in the words and figures following, to-wit:

Interpleader of Opdyke & Calhoun.

United States of America, Southern District of Illinois.

In the United States Circuit Court. January Term, 1877.

The Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, late partners, doing business under the name and style Winslow & Wilson. } *Attachment.*

And George Opdyke and Philo C. Calhoun, as trustees, by Bluford Wilson, their attorney, came and interplead according to the form of the Statute of the State of Illinois, in such cases made and provided, and say that the said real estate, right of way and property, situated in the county of St. Clair and State of Illinois, to wit: All the right of way, being fifty feet on each side of the centre or middle of the track of the railroad, extending and running from the railway of the St. Louis and Southeastern Railway Company (consolidated), in section twenty-two, township one north, range eight west, to the mill of Tiedmann & Co., in the northeast quarter of section thirty, township two north, range seven west, formerly known as the Belleville and O'Fallon Rail-
28 road; spikes, ties, bridges, culverts, embankments, switches, frogs and road-bed now upon said right of way, attached and seized by virtue of the said writ of attachment in that behalf, were at the time said real estate, right of way and property were so attached and seized, and still are, the property of the said George Opdyke and Philo C. Calhoun, as trustees, and not the property of the said Edward F. Winslow and James H. Wilson, or either of them, as stated in the said attachment writ. And this the said George Opdyke and Philo C. Calhoun are ready to verify; wherefore they pray judgment if their said property ought to be detained by virtue of the said writ.

BLUFORD WILSON,
Attorney for George Opdyke and Philo C. Calhoun.
J. M. HAMILL, *of counsel.*

United States of America, Southern District of Illinois.

Bluford Wilson makes oath and says that he is the attorney in this behalf of the said George Opdyke and Philo C. Calhoun, as trustees, and that their plea of interpleader above set forth is true in substance and in fact.

BLUFORD WILSON.

Subscribed and sworn to before me, this 15th day of March, 1877.
J. A. JONES, *Clerk.*

29 (Endorsed.)

Filed March 15, 1877.

J. A. JONES, *Clerk.*

Now afterwards, to-wit: on the sixteenth day of March, of the year last aforesaid, came again said plaintiff, by Messrs. C. W. and E. L. Thomas, its attorneys, and filed in the Clerk's office of said Court, its answer to interpleader of Opdyke and Calhoun, which said answer is in the words and figures following, to-wit:

Answer to Interpleader of Opdyke & Calhoun.

United States of America, Southern District of Illinois.

In the United States Circuit Court. January Term, A. D. 1877.

The Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, partners, &c. } *Attachment.*

And now comes the plaintiff, by C. W. & E. L. Thomas, its attorneys, and for answer to the interpleader filed herein by George Opdyke and Philo C. Calhoun, says that at the time the said attachment writ was levied upon the property in said interpleader described, the title to the same was in said defendants, and not in said Opdyke and Calhoun, as alleged in said interpleader, and the same was subject to attachment as the
30 property of defendants, and this plaintiff prays may be inquired of, &c.

C. W. & E. L. THOMAS,
for plaintiff.

(Endorsed.)

Filed March 16, 1877.

J. A. JONES, *Clerk.*

Afterwards, to.wit: on the tenth day of April, of the year last aforesaid, came again said plaintiff, by C. W. Thomas, Esq., its attorney, and filed in the Clerk's office of said Court its interrogatories, to be answered by the Belleville and O'Fallon Railroad Company as garnishee, in the words and figures following, to-wit:

In the Circuit Court of the United States. January Term, A. D. 1877.

The Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, partners, etc. } *Attachment.*

Interrogatories to be answered by the Belleville and O'Fallon Railroad Company garnishee in said case:

Int. 1.—Were you, at the time of the service of the garnishment in this case upon you, in any manner indebted to Edward F. Wins-
31 low or James H. Wilson, or to the firm of Winslow & Wilson; and if you were, state in what amount, and on what account you were so indebted, and to whom?

Int. 2.—Did you at the time of said service have in your possession, custody or control, any money, property or effects of Edward F. Winslow, James H. Wilson, or the firm of Winslow & Wilson; and if you had, state what, and what amount you so had, and to whom it belonged?

C. W. THOMAS,
Attorney for plaintiff.

(Endorsed.)
Filed April 10th, 1877.

J. A. JONES, *Clerk.*

Afterwards, to-wit: on the tenth day of April, in the January term of said Court, in the year last aforesaid, the following further proceedings were had in said Court in said cause, and entered of record, to-wit:

Judgment.

Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, partners, under name and style of Winslow & Wilson. } *Attachment.*

32 This day comes as well the plaintiff, by Messrs. C. W. and E. L. Thomas, its attorneys, as the defendants, by Bluford Wilson, Esq., and James M. Hamill, Esq., their attorneys, and the plaintiff dismisses its suit as to certificate No. one hundred and thirty-three calling for six and a half shares of the Belleville Building and Loan Association, and releases the same from levy made under the writ of attachment herein issued. And now the issue joined by consent is tried by the Court, a jury being waived and the Court having heard evidence and argument of counsel, finds the issue for the plaintiff, and assesses its damages at the sum of forty-three thousand two hundred and sixty-six dollars and sixty-six cents.

It is, therefore, ordered and adjudged by the Court that the plaintiff recover of the defendants the said sum of forty-three thousand two hundred and sixty-six dollars and sixty-six cents, its damages as aforesaid assessed, together with the sum of ———— dollars and ———— cents, its costs and charges by it about its suit in this behalf expended, and that a special execution issue requiring the Marshal to make sale of the remainder of the property attached, to-wit: All the right of way fifty feet on each side of the centre or middle of the track of the railroad, extending and running from the railway of the St. Louis and Southern Eastern Railway Company (consolidated), in section twenty-two,
33 township one north, range eight west, to the mill of Tiedmann & Co., in the northeast quarter of section thirty, township two north, range seven west, formerly known as the Belleville and O'Fallon Railroad, together with all the railroad track, iron, spikes, ties, bridges, culverts, embankments, switches, frogs and road bed now upon said right of way.

On motion of plaintiff, by its attorneys, leave is granted to file interrogatories, which the Belleville and O'Fallon Railroad Company garnishee is required to answer by the first Monday of June next.

Afterwards, to-wit: on the 4th day of September, in the June term of said Court, in the year last aforesaid, the following further proceedings were had in said Court in said cause, and entered of record, to-wit:

Judgment on Interpleader of Opdyke & Calhoun.

Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, partners, under name and style of Winslow & Wilson. } *Attachment.*

On the interpleader of George Opdyke and Philo C. Calhoun, claiming the property attached in this cause, and the answer of the plaintiff thereto.

34 And now, on this fourth day of September, 1877, come the said George Opdyke and Philo C. Calhoun, by their counsel, and the plaintiff by its counsel, and submit to the Court all questions arising on the interpleader, and the answer thereto, and the Court having heard their proof and allegations, and being sufficiently advised in the premises, finds that the property levied on by the attachment issued in this cause was at the date of this levy thereof the property of the interpleaders, George Opdyke and Philo C. Calhoun, and not the property of Edward F. Winslow and James H. Wilson. It is, therefore, ordered by the Court that the proceedings in attachment in this cause be dismissed at the costs of the plaintiff. And therefore the plaintiff tenders its bill of exceptions, which is signed and made part of the record in this cause. And now, on motion of plaintiff, a writ of error is allowed in this case to the Supreme Court of the United States, on the plaintiff entering into bond to the persons interpleading herein, in the penalty of five hundred dollars, conditioned as the law directs.

Bill of Exceptions.

United States of America, Southern District of Illinois.

In the United States Circuit Court. June Term, A. D. 1877.

The Peoples' Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, late partners, under the name of Winslow & Wilson. } *Attachment.*

35 George Opdyke and Philo C. Calhoun, interpleaders, claiming property levied on by virtue of the writ of attachment.

Be it remembered that upon the trial of the issue made in said cause, on the declaration and plea of defendants, the allegations of the declarations were proved; and be it also remembered that upon the trial of the issue made upon said interplea, to-wit: whether the property in question was subject to said attachment as the property of defendants, the interpleaders read in evidence the following:

A record of the proceedings of the County Court of St. Clair county, Illinois, whereby it was proved that the St. Louis and South Eastern

Railway Company acquired all the right, title and interest of the Belleville and O'Fallon Railroad Company, in and to the property described in the interplea mentioned, except the track, ties, iron, spikes, switches, and frogs therein named, by condemnation in due form, under the laws of Illinois, for which said St. Louis and South Eastern Railway Company paid said Belleville and O'Fallon Railroad Company the value of the property condemned, to-wit: the sum of $30,000, the said proceedings for condemnation being instituted on the 30th day of June, 1871, and the said title by condemnation being perfected on the 5th day of July, A. D. 1871, and the parties to said proceedings were the said St. Louis and South Eastern Railway Company on one part, and the said Belleville and O'Fallon Railroad Company on the other part, which pro-
36 ceedings are in the words and figures following, to-wit:

To the Circuit Court of St. Clair County, Illinois.—The petition of the St. Louis and South Eastern Railway Company:

Your petitioner showeth that the St. Louis and Southeastern Railway Company was duly incorporated by an Act of the General Assembly of the State of Illinois, approved and in force March tenth, A. D. 1869; and by virtue of said act and an act of said Assembly, entitled "An act to amend the law condemning the right of way for purposes of internal improvement," approved June 22d, A. D. 1852, and acts amendatory thereof, was authorized and empowered to locate, construct, furnish, maintain and operate a railway with one or more tracks, across the whole State of Illinois, from the bank of the Mississippi river, opposite the city of St. Louis, Missouri; thence to Mount Vernon, in Jefferson county, Illinois; thence to McLeansboro, in Hamilton county, Illinois; thence to Equality, and thence to Shawneetown, on the Ohio river; and that by said acts the St. Louis and South Eastern Railway Company became authorized and empowered to take and apply private property to its own use by condemnation. Your petition further shows that by said act of the General Assembly of said State, approved and in force March
37 10th, A. D. 1869, and by virtue of the General Laws of said State, said St. Louis and South Eastern Railway Company was empowered and authorized to consolidate and connect its railway with any other continuous line of railroad now authorized or hereafter authorized to be constructed within or without this State, to be connected upon such terms as may be agreed upon; and for that purpose full power by said acts was given to make and execute such contracts as would secure the objects of consolidation. Your petitioner further shows that by an act of the General Assembly of the State of Illinois, approved and in force March 29th, 1869, entitled "An act to incorporate the Evansville and Southern Illinois Railroad Company," said company was incorporated and authorized to locate, construct, maintain and operate a railroad from the town of McLeansboro, in Hamilton county, Illinois, and through the towns of Enfield and Carmi, in White county, Illinois, to the dividing line between the State of Indiana and Illinois, on the Big Wabash river, and was authorized by said act, and an act of the General Assembly of the State of Illinois, entitled "An act to amend the law

condemning the right of way for purposes of internal improvement," approved June 22d, A. D. 1852, and any and all laws of said State that may be in force; and by said act, approved March 29th, A. D. 1869, and by the General Laws of the State of Illinois, said Evansville and Southern Illinois Railroad Company was authorized and empow-
38 ered to consolidate and connect its railway with any other continuous line of railroad now authorized or hereafter to be constructed, and to make and execute such contracts as would secure the objects of such consolidation and connection. Your petitioner further shows that on the ninth day of June, 1869, the Evansville, Carmi and Paducah Railroad Company was duly and legally incorporated by an act of the General Assembly of the State of Indiana, entitled "An act to provide for the incorporation of railroad company," and approved May 11th, A. D. 1852, and acts acts amendatory and supplemental thereto, by compliance with the requirements of said acts; and by virtue of said acts and compliance became a body corporate, with full power to contract, maintain and operate a railroad from the city of Evansville, Indiana, to the Big Wabash river, in the general direction of Carmi, in White county, Illinois. Your petitioner further shows that said Evansville, Carmi and Paducah Railroad Company, by an act of the General Assembly of the State of Indiana, approved February 23d, A. D. 1853, entitled "An act to authorize railroad companies to consolidate their stock with the stock of railroad companies in this or adjoining States, and to connect their roads with the roads of said companies, and to authorize railroad companies to construct their roads on the
39 routes which they may have heretofore surveyed and located, and to use and occupy the same when completed," and acts amendatory thereof, was authorized and empowered to consolidate with any railroad in an adjoining State to the State of Indiana, according to the laws of said adjoining State. Your petitioner further shows that by virtue of the powers hereinbefore enumerated, after a full compliance with all the conditions of said acts, the St. Louis and South Eastern Railway Company and the Evansville and Southern Illinois Railroad Company did, on the 21st day of February, A. D. 1871, enter into articles of consolidation, assuming and taking the name of the St. Louis and South Eastern Railroad Company, which said articles of consolidation were, in compliance with said acts hereinbefore mentioned, filed in the office of the Secretary of State of the State of Illinois. That by virtue of said act and said articles said St. Louis and South Eastern Railroad Company became vested with the powers and franchises granted by said acts to the said St. Louis and South Eastern Railway Company and said Evansville and Southern Illinois Railroad Company. Your petitioner shows that by virtue of the powers granted in the acts before mentioned, the said St. Louis and South Eastern Railroad Company and the said Evansville, Carmi and Paducah Railroad Company, after full compliance
40 with the provisons of said acts, did, on the 28th day of February, 1871, enter into articles of consolidation, and assumed the name of the St. Louis and South Eastern Railway Company, copies of which said articles have been in compliance with said acts filed in the office of

the Secretaries of the States of Illinois and Indiana, by virtue of which articles your petitioner, the St. Louis and South Eastern Railway Company has become vested with the powers and franchises granted by the acts hereinbefore mentioned to the St. Louis and South Eastern Railroad Company, and the Evansville, Carmi and Paducah Railroad Company. Your petitioner further shows that by virtue of the acts hereinbefore mentioned, approved March 10th, 1869, and June 22d, 1852, and acts amendatory thereof, and by virtue of said articles of consolidation, and in compliance with the powers vested by said acts, your petitioner has surveyed and located a branch railway or switch connecting with the main line of railway, now located and operated by said company, which said branch railway or switch does not exceed ten miles in length, which said branch railway commences at a point on the line of the main railway, where the Belleville and O'Fallon Railroad is now located, and graded up to said line of the said main railway, and connects therewith, being in the southwest quarter of section fifteen, township one north,
41 range eight west, in St. Clair county, Illinois; and that said branch railway, surveyed and located as aforesaid, passes over and across the lands hereinafter set forth and described, situated in said county of St. Clair, in which lands some title or interest is had or claimed by persons or corporations, whose names, as well as the extent of title claimed or had by them, in so far as the knowledge of your petitioner extends, is hereinafter more particularly set forth. Your petitioner shows that for the construction and operation of said branch railway it will be necessary for your petitioner to appropriate to its exclusive use forever, for the purposes of right of way, the following described tract of land, to-wit: All that strip of land upon which the Belleville and O'Fallon Railroad is now located and graded, extending from its connection, as hereinbefore mentioned, with the main railway of the said St. Louis and South Eastern Railway Company, in southwest quarter of section fifteen, township one north, range eight west, in St. Clair county, Illinois, to the connection of the railroad of the said Belleville and O'Fallon Railroad Company, as now located and graded, with the track or railroad of the Ohio and Mississippi Railway Company, in section thirty, township two (2) north, range seven west, in said county of St. Clair and State of Illinois; the tract of land hereby intended to be taken being the
42 entire right of way of the said Belleville and O'Fallon Railroad Company, as the same is now located and graded, from the city of Belleville, in said county, to the town of O'Fallon, in said county, as shown by a plat thereof filed in the office of the Clerk of the Circuit Court of said county, on the twenty-sixth day of March, A. D. 1870, reference to which said plat, for a more particular description of said right of way, of said Belleville and O'Fallon Railway Company, hereby intended to be taken, is hereby had, and in which the interest of the said Belleville and O'Fallon Railroad Company is a perpetual right of way; and also all the rights, privileges and franchises of said Belleville and O'Fallon Railroad Company granted it by an act of the General Assembly of said State of Illinois, entitled "An act to incorporate the Belleville and O'Fallon Railroad Company," approved March 30th, 1869.

Your petitioner further shows that it has not been able to acquire the title to said pieces or parcels of land above described, from the said Belleville and O'Fallon Railroad Company, and other parties interested therein, by purchase or voluntary grant; and would therefore pray that three disinterested persons, freeholders and residents of said county, may be appointed to fix the compensation and assess the damages which the above named Belleville and O'Fallon Railroad Company, or
43 others having an interest in said above described tract of land, may be entitled to by reason of the appropriation of the same to the use of your petitioner for the purposes aforesaid, as is by law provided. And your petitioner will ever pray, &c.

THE ST. LOUIS AND SOUTHEASTERN RAILWAY CO.
By C. W. & E. L. THOMAS, *its Attorneys.*

State of Illinois, county of St. Clair, *ss.*

To all whom these presents shall come—Greeting: Be it remembered that on this day came the St. Louis and South Eastern Railway Company, by C. W. and E. L. Thomas, its proper agents and attorneys, and on presentation of the foregoing petition filed in the office of the Clerk of the Circuit Court of said county, on the thirtieth day of June, 1871, for the appropriation of a certain tract of land and certain franchises in said petition described, and belonging to the Belleville and O'Fallon Railroad Company, Edward Abend, the President of said company, being present. And it further appearing that the said Edward Abend, President of said company, as aforesaid, waives notice of these proceedings, and here consents, on behalf of said company, to the appointment of commissioner, without any further notice thereof, and the allegations of the parties having been heard, and not sufficient objection being shown to said petition, it is ordered that William Maus, Jacob Krill and
44 Francis H. Cobb, disinterested persons, freeholders, and residents of said county of St. Clair, be and they are hereby appointed commissioners to fix the compensation and assess the damages to which the said Belleville and O'Fallon Railroad Company will be entitled to receive from the said St. Louis and South Eastern Railway Company by reason of the taking and appropriation of the said tract of land and franchises in said petition mentioned. And it is ordered that said commissioners, after having been first duly sworn according to law, shall meet for the purposes of the duty assigned them, at Belleville, in the said county of St. Clair, on third day of July, A. D. 1871, at three o'clock P. M., and to proceed to perform their said duties without delay, and shall make due return and report thereof, certified under their hands and seals, into the office of the Clerk of this Court, the doing of which this order, made in pursuance of law, shall be their full warrant and authority.

Given under my hand and seal, at the Court House in Belleville, in said county, this third day of July, A. D. 1871.

F. H. PIEPER,
County Judge, St. Clair county, Ill.

45 State of Illinois, St. Clair county, *ss.*

We, the undersigned, William Maus, Jacob Krill and Francis H Cobb, do solemnly swear that we will faithfully and impartially execute the duties required of us in condemning the right of way for the St. Louis and South Eastern Railway Company, to our best judgment and uuderstanding, and that we will make, allow, estimate and assessments according to law, so help us God.

WILLIAM MAUS,
JACOB KRILL,
FRANCIS H. COBB.

Sworn to and subscribed before me, this third day of July, 1871.
[SEAL.] SEBASTIAN FIETSAM, *County Clerk.*

State of Illinois, St. Clair county.

We, the undersigned commissioners, appointed by the Hon. Frederich H. Pieper, Judge of the County Court of St. Clair county and State of Illinois, on the 3d day of July, A. D. 1871, to estimate and appraise the damages or injury which the Belleville and O'Fallon Railroad Company may sustain, over and above the benefits which said Belleville and O'Fallon Railroad Company may derive by reason of the taking of the following described tracts of land and franchises by the St. Louis
46 and South Eastern Railway Company for the use of said St. Louis and South Eastern Railway Company, for a branch railway, to-wit: All that strip of land upon which the Belleville and O'Fallon Railroad is now located and graded, extending from its connection with the main railway of the said St. Louis and South Eastern Railway Company, in southwest quarter of section fifteen, township one north, range eight west, in St. Clair county, Illinois, to the connection of the railroad of the said Belleville and O'Fallon Railroad Company, as now located and graded, with the track or railroad of the Ohio and Mississippi Railway Company, in section thirty, township two north, range seven west, in said county of St. Clair and State of Illinois; the tract of land hereby intended to be taken being the entire right of way of the said Belleville and O'Fallon Railroad Company, as the same is now located and graded, from the city of Belleville, in said county, to the town of O'Fallon, in said county, as shown by a plat thereof, filed in the office of the Clerk of the Circuit Court of said county, on the twenty-sixth day of March, A. D. 1870, reference to which said plat, for a more particular description of said right of way of said Belleville and O'Fallon Railroad Company, hereby intended to be taken, is hereby had; and also all the rights, privileges and franchises of said Belleville and O'Fallon Railroad Company granted it by act of the General Assembly of said State of Illi-
47 nois, entitled "An act to incorporate the Belleville and O'Fallon Railroad Company," approved March 30, 1869, would respectfully report that after being duly sworn to faithfully and impartially execute the duties required of us according to our best judgment and understanding, and to make all our estimates and assessments according to law, we went upon the above described premises and made a full exami-

nation of the same; and having on the fifth day of July, A. D. 1871, heard such testimony as either party had to offer, the said Belleville and O'Fallon Railroad Company being present, by Edward Abend, its President, we estimate the value of said tract of land as aforesaid at thirty thousand dollars; we estimate the damages to the Belleville and O'Fallon Railroad Company, by reason of the taking of the same by said St. Louis and South Eastern Railway Company as a right of way for said railway, at thirty thousand dollars; and we estimate the benefits and advantages accruing to said Belleville and O'Fallon Railroad Company as owner of a perpetual right of way as aforesaid, on account of the construction of such branch railway by said St. Louis and South Eastern Railway Company, at nothing, and we estimate the value of said franchises at one hundred dollars; and we estimate the damages sustained by said Belleville and O'Fallon Railroad Company, by reason of the taking of said land and franchises for the purposes aforesaid, at $30,000,
48 being the amount to be paid to said Belleville and O'Fallon Railroad Company by said St. Louis and South Eastern Railroad Company.

Witness our hands and seals, this fifth day of July, A. D. 1871.

WILLIAM MAUS, [L. S.]
JACOB KRILL, [L. S.]
FRANCIS H. COBB. [L. S.]

State of Illinois, St. Clair county, *ss.*

I, Charles Becker, Clerk of the Circuit Court and *ex-officio* Recorder in and for said county of St. Clair and State of Illinois, do hereby certify the foregoing to be a true and correct copy of petition, order of County Judge, oath of Commissioners, and report of Commissioners, in the matter of the condemnation proceedings of the Belleville and O'Fallon Railroad Company, as the same now remains on file in my office. I further certify that I find no conveyances on record, since January 1st, 1871, regarding the real estate of above named railroad, made either by the Belleville and O'Fallon Railroad Company, St. Louis and South Eastern Railway Company, James H. Wilson, or Edward F. Winslow, nor by Winslow and Wilson, except the following, to-wit:—Trust deed, B. & O'F. R. R. Co. to Charles W. Thomas, trustee, recorded in Book J 5, page 182. Trustee's deed, B. & O'F. R. R. Co., by C. W.
49 Thomas, trustee, to James H. Wilson and Edward F. Winslow, recorded in Book Z 5, page 630. Trust deed, St. Louis and Southeastern Railway Company, to George Opdyke and Philo C. Calhoun, trustees, recorded in Book Q 5, page 362. Trust deed, St. Louis and South Eastern Railway Company to George Opdyke and Philo C. Calhoun, trustee, recorded in Book R 5, page 79.

In witness whereof I hereunto set my hand and affix the seal of said Court, at office in Belleville, Illinois, this 28th day of December, A. D. 1875.

[L. S.] CHARLES BECKER, *Clerk.*

Also, a mortgage or trust deed, executed by the said St. Louis and South Eastern Railway Company, to the interpleaders, as trustees, conveying in trust to secure $105,000 bonds, due in —— years, with interest coupons attached, all the property described in the interplea by the description of the O'Fallon branch of said St. Louis and South Eastern Railway Company, and all the tolls, issues and profits thereof, and authorizing said trustees to enter and sell the property conveyed in default of the payment of said bonds or interest coupons. This instrument bears date August first, 1872, is in due form of law, and was duly recorded in said county on the 15th day of October, A. D. 1872, which instrument is in words and figures as follows, to-wit:

Deed from the St. L. and S. E. R. R. Co. to Calhoun & Opdyke.

50 This indenture, made the first day of August, in the year one thousand eight hundred and seventy-two, between the St. Louis and South Eastern Railway Company, a corporation organized under the laws of the States of Illinois and Indiana, party of the first part, and George Opdyke, of the city of New York, and Philo C. Calhoun, of the said city of New York, as trustees, parties of the second part, witnesseth:

Whereas, by an act of the Legislature of the State of Illinois, passed the tenth day of March, one thousand eight hundred and sixty-nine, a corporation was created under the name of "The St. Louis and Southeastern Railway Company," authorized and empowered, among other things, to construct and operate a railroad across the whole State of Illinois, from a point on the easterly bank of the Mississippi river, known as East St. Louis; thence to Mount Vernon, in Jefferson county; thence to McLeansboro, in Hamilton county; and thence to Shawneetown, upon the north bank of the Ohio river, in the State of Illinois; and also empowered, among other things, to build the said railroad in sections of any prescribed length, and to build branches not more than ten miles in length, and to consolidate and connect its railway with other railways then or thereafter authorized, and to issue its bonds, secured by mortgage, upon the said railroad, its property and franchises, and to

51 sell the same at any rate.

And whereas, by an act of the Legislature of the State of Illinois, passed the twenty-sixth day of March, one thousand eight hundred and sixty-nine, a corporation was created under the name of the Evansville and Southern Illinois Railroad Company, authorized and empowered, amongst other things, to construct and operate a railroad from the town of McLeansboro, Hamilton county, in the State of Illinois, through the towns of Enfield and Carmi, in White county, Illinois, to the dividing line between the States of Indiana and Illinois, on the Big Wabash river, and to build branches not more than ten miles in length; and also empowered, among other things, to consolidate and connect its railway with other railways, there or thereafter authorized; to issue its bonds, secured by mortgage upon the said railroad, its property and franchises, and to sell the same at any rate.

And whereas, the said St. Louis and South Eastern Railway Company, and the Evansville and Southern Illinois Railroad Company, so incorporated, as aforesaid, acting under and by authority of their respective charters, and by the laws of the State of Illinois, did, on the 21st day of February, A. D. 1871, after due and legal notice given
52 to all the stockholders of each of said companies, and their consent thereto, in writing, previously obtained, consolidate, amalgamate and merge their said corporations into one body corporate, called and named the St. Louis and South Eastern Railroad Company, the said body corporate succeeding to all the rights, privileges, immunities, advantages, franchises, easements, and choses in action of said companies, and assuming all the debts and liabilities, and the performance of all the contracts of said respective corporations.

And whereas, on the 9th day of June, one thousand eight hundred and sixty-nine, a corporation was duly formed and incorporated, under and pursuant to the laws of the State of Indiana, entitled "An act to provide for the incorporation of railroad companies," approved May 11th, 1852, and the acts amendatory thereof and supplemental thereto, by a compliance with all the requirements of said act; and by virtue of said act and said compliance became a body corporate, under the name of the Evansville, Carmi and Paducah Railroad Company, for the purpose, among other things, of constructing and operating a railroad in the State of Indiana, from the city of Evansville, in the State of Indiana, through the counties of Vanderburg and Posey, in said State of Indiana, in the general direction of Carmi, in the State of Illinois, to a point on
53 the bank of the Wabash river, which corporation was duly empowered, under the laws of the State of Indiana, among other things, to consolidate with any other railroad, constructed or in process of construction, within the State of Indiana, or in any adjoining State, upon such terms as might be mutually agreed upon, thereby making one corporation of the two railroads so consolidated; and was also empowered to issue its bonds, secured by mortgage upon its railroad, its property and franchises, and to sell the same at such rates as would best advance the interest of such corporation.

And whereas, the Congress of the United States, by a joint resolution approved July 14th, 1870, granted to the said Evansville and Southern Illinois Railroad Company, the right to construct an iron or wooden bridge for railroad purposes, and as a public highway, either with a draw or a continuous span, as might be determined, across the Big Wabash river, at any point said Evansville and Southern Illinois Railroad Company might select, either at the little chain, in or opposite White county, Illinois, and Posey county, Indiana, or at any point above the same, extending up said river as far as the town of New Harmony, in the county of Posey, such bridge to be a legal structure and a post road for the transmission of United States mails, and to be constructed
54 subject to certain conditions named in said resolutions.

And whereas, the said St. Louis and Southeastern Railroad Company, by virtue of the consolidation, aforesaid, succeeded to the rights and franchises granted by said resolution to the said Evansville

and Southern Illinois Railroad Company and the said St. Louis and South Eastern Railway Company, and possessed such rights and franchises as fully and completely as the said Evansville and Southern Illinois Railroad Company and the said St. Louis and South Eastern Railway Company had and possessed the same.

And whereas, the aforesaid St. Louis and South Eastern Railroad Company and the said Evansville, Carmi and Paducah Railroad Company, acting under the authority of and in pursuance of their respective charters, and the laws of the States of Illinois and Indiana, did, on the twenty-eighth day of February, A. D. 1871, after due and legal notice given to all the stockholders of each of said companies, and their consent thereto, in writing, previously obtained, consolidate, amalgamate, and merge their said corporations into one body corporate, called and named the St. Louis and South Eastern Railway Company, being the party hereto of the first part, the said body corporate succeeding to all the rights, privileges, immunities, advantages, franchises, easements, and choses in action of said companies, and assuming all the debts
55 and liabilities and the performance of all the contracts of the said respective corporations.

And whereas, the said party of the first part has constructed within the counties of St. Clair and State of Illinois, certain branches of its said railroad, and has resolved to construct and operate a branch line of its railroad, about eight miles in length, from Belleville to O'Fallon, in St. Clair county, State of Illinois.

And whereas, for the purpose of securing the more speedy construction and equipment of the said branch lines, the said party of the first part has, by its Board of Directors, duly resolved to borrow the sum of one hundred and fifty thousand dollars, and for that purpose to issue its first mortgage bonds for the said amount, of the same tenor and purport as the series issued upon the original line, and upon the Evansville Division, to be secured by a mortgage (also of the same tenor and purport as the said former series) upon the said branch lines, built or to be built, by the said party of the first part, and to make the said mortgage bond convertible, at the pleasure of the the holder, into coupon bonds, for one thousand dollars each, which last bonds shall be in the following form:

United States of America.
States of Illinois and Indiana.
1000.00.
First Mortgage Convertible Bonds.
Branch Series.

56 The St. Louis and South Eastern Railway Company hereby acknowledge itself indebted to George Opdyke and Philo C. Calhoun, trustees, or bearer, in the sum of one thousand dollars, which sum the said company hereby agrees to pay to the holder hereof at its office in the city of New York, in gold coin of the United States, on the thirty-first day of October, one thousand eight hundred and ninety-four, and also interest thereon, at the rate of seven per centum per annum in

like gold coin of the United States, free from any United States Government tax, payable semi-annually on the first days of November and May, in each year, upon presentation of the interest warrants, or coupons hereto attached, as they severally fall due. The payment of this bond is secured by a deed of trust or mortgage upon the railroad, appurtenances and property of said company specified therein, as mentioned in the annexed certificate of the trustees, which deed of trust authorizes the issue of bonds of like tenor with the present, to the amount of one hundred and fifty thousand dollars ($150,000), and provides that such bonds shall be issued at the rate of fifteen thousand dollars ($15,000), and no more, for each mile of track of the railroad of said company thereby mortgaged actually in process of construction; and which deed of trust further provides that in case of default for the period of four months in the payment of interest upon any of said bonds, the whole principal sum shall become due and payable. This bond may at
57 any time, at the option of the holder thereof, be converted into ten shares of the capital stock of the St. Louis and South Eastern Railway Company, upon surrender of the bond. This bond shall pass by delivery or transfer on the books of the company in the city of New York, or at any other place which the company may determine.

After a registration of ownership certified hereon by the transfer agent of the company, no transfer, except on the books of the company, shall be valid, unless the last transfer be to bearer, which shall restore transferability by delivery; but this bond shall continue, subject to continual registration and transfers to bearer, as aforesaid, at the option of each holder. On a registration of ownership the holder may, at his option, surrender the coupons, which will then be cancelled, and thereafter the interest will be payable to the registered holder hereof, or his attorney.

In testimony whereof the said company have caused these presents to be executed by its president, and attested by its secretary, and its corporate seal to be hereunto attached the ——— day of ———, A. D. one thousand eight hundred and seventy-two.

THE ST. LOUIS AND SOUTHEASTERN RAILWAY CO.

Attest: ———————, *President.*

58 And the following certificate shall be endorsed upon the said bonds by the said trustees, viz:

This is to certify that the St. Louis and South Eastern Railway Company has executed to us a deed of trust or mortgage, purporting to convey the branch line of its road from Belleville to O'Fallon, and all the branch lines heretofore built and to be built by it, in the county of St. Clair and State of Illinois, until the aggregate length of all the roads so constructed as branch lines shall exceed one hundred miles, with the appurtenances thereto in trust, for the benefit of the holders of its bonds, of similar tenor with the foregoing, for the sum of one thousand dollars each, issued and to be issued in pursuance of said mortgage, such issues not to exceed the sum of one hundred and fifty thousand dollars

in the aggregate, and to be made at the rate of fifteen thousand dollars ($15,000) for each mile of its road thereby mortgaged, actually in process of construction, with power to take possession of said railroad and appurtenances, and to use and sell the same in case of default in the payment of the principal or interest, subject to the control of a majority of the holders of said bonds then outstanding; and the foregoing is one of the several bonds described in and secured by the said mortgage, and that the said mortgage has been recorded in every county through which the said railroad has been constructed or located.

————————, *Trustees.*

59 Now, therefore, in order the better to secure the payment of the said bonds, according to the tenor thereof and in consideration of the premises, and of one dollar to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, the said St. Louis and South Eastern Railway Company, the party hereto of the first part, hath granted, sold, conveyed, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, convey, assign, transfer and set over unto the said George Opdyke and Philo C. Calhoun, the parties hereto of the second part, as trustees, the survivor of them and their and his successor or successors and assigns forever, all and singular the said branch lines of railroad, built or to be built, by the said party of the first part, under its chartered powers, as at present possessed or as hereafter acquired, especially a branch line from Belleville to O'Fallon, in the county of St. Clair and State of Illinois, and every other branch line, built or to be built by the said party of the first part, within the county of St. Clair and State of Illinois; to have and to hold the said railroad, equipments, property, estate, franchises, and privileges, and every part thereof, with the appurtenances, unto the said George Opdyke and Philo C. Calhoun, trustees, the survivor of them, and their or his successor of them, and their or his successor or successors and assigns, in trust, for the purposes and on the conditions and with
60 the covenants hereinafter expressed, to-wit:

First.—Until default shall be made in the principal or interest of the said bond or bonds, or some of them, or until default shall be made in respect to something by these presents required to be done, observed, performed, or kept by the party of the first part, the party of the first shall be suffered and permitted to possess, manage, operate and enjoy the said hereinbefore described railroad, and every part thereof, with its equipments and appurtenances, and to take and use the tolls, incomes, rents, issues, and profits thereof, in the same manner and with the same effect as if this deed had not been made.

Second.—In case default shall be made in the payment of any interest, or of the aforesaid bond or bonds, issued or to be issued, according to the tenor thereof, or of the coupons thereto annexed, or in any requirements to be done or kept by the party of the first part; and in case such default shall continue for the period of four months, it shall be lawful for the said trustees, the survivor of them, and their or his successor or successors, personally or by their or his attorney or agent, to enter into or upon all

and singular the railroad and premises hereby conveyed, or intended so to be conveyed, and each and every part thereof, and to have, hold and use the same, operating by their superintendents, managers,
61 receivers or servants, or other attorney or agent of the said railroad, and conducting the business thereof, and making from time to time all repairs and replacements, and such useful alterations, additions and improvements thereto as may seem to them or him to be judicious; and collect and receive all tolls, freights, incomes, rents, issues, and profits of the same, and of every part thereof; and after deducting the expenses of operating the said railroad and conducting its business, and of all the said repairs, replacements, alterations, additions, and improvements, and all payments which shall be made for taxes, assessments, charges or liens, prior to the lien of these presents, upon the said railroad and premises, or any part thereof, to apply the moneys arising as aforesaid to the payment of interest upon said bond or bonds, in the order in which such interest shall have become or shall become due, ratably to the persons holding the coupons evidencing the right to such interest; and after paying all interest which shall have become due, to apply the same to the satisfaction of the principal of said bond or bonds which may be at that time due and unpaid, ratably and without discrimination or preference.

Third.—In case default shall be made as aforesaid, and shall continue as aforesaid, or in case default shall be made in the payment of
62 the principal of said bond, or any of the said bonds, or any part thereof, and such default shall continue for the period of eight months, it shall likewise be lawful for the said trustees, the survivor of them, and their or his successor or successors, after entry as aforesaid, or other entry, personally or by his or their atttorney or agent, to sell and dispose of all and singular the railroad and premises hereby conveyed, or intended so to be, at public auction, either in the city of New York or at such places in the State of Illinois or the State of Indiana as he or they may designate, and at such time as he or they may appoint, having first given notice of the time and place of such sale by advertisement, to be published not less than three times a week for six weeks, in one or more newspapers in the cities of New York, St. Louis, Chicago and Evansville, respectively, and to adjourn the said sale from time to time, in his or their discretion; and if so adjourning, to make the same at the time and place to which the same may be so adjourned, and upon such sale to make and deliver to the purchaser or pur-
63 chasers of the property so sold, good and sufficient deed or deeds in the law for the same, which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the party of the first part, and all other persons whomsoever, lawfully claiming or to claim the said railroad and premises or any part thereof, by, from, through or under it; and after deducting from the proceeds of such sale just allowance for all expenses of the said sale, including attorneys and counsel fees, and all other expenses, advances or liabilities, which may have been made or incurred by the said trustees, in operating and maintaining the said railroad, or in managing its business while in possession, and all payments which may have been made by them for taxes or assessments

on the said premises, or any part thereof, as well as compensation for their own services, to apply the said proceeds to the payment of the principal of such of the aforesaid bond or bonds as may be at that time unpaid, whether or not the same shall have previously become due, and of the interest which shall have accrued on the said princi-
64 pal and be unpaid, without discrimination or preference, ratably to the aggregate amount of such unpaid principal and accrued unpaid interest; and if after satisfaction thereof, a surplus of the said proceeds shall remain, to pay over the same to the said party of the first part, or to whomsoever may be lawfully or equitably entitled to receive the same.

And it is hereby declared that the receipt of the said trustees shall be a sufficient discharge to the purchaser or purchasers of the premises for his or their purchase money, and that such purchaser or purchasers, his or their heirs, executors, administrators or assigns, shall not, after payment thereof, and having such receipts, be liable to see to its being applied upon or for the trusts and purposes of these presents, or in any manner whatsoever be answerable for any loss, misapplication, or non-application of such purchase money, or any part thereof, or be obliged to inquire into the necessity, expediency, or authority of or for
65 any such sale.

Fourth.—In case default shall be made in the payment of any of the said coupons, or semi-annual interest upon any of the said bond or bonds, at the time and in the manner in the coupons issued therewith, provided the said coupon has been presented, and the payment of the interest therein specified has been demanded, and in case such default shall continue for the period of four months after the said coupons shall have become due and payable, there and thereupon the principal of the said bond or bonds secured hereby shall, at the election of the trustees, become immediately due and payable, anything contained in the said bond or bonds, or herein, to the contrary notwithstanding; but a majority in the interest of the holders of said bond or bonds may, by an instrument in writing signed by such majority, before the interest in arrears shall be paid, instructs the trustees to declare the said principal to be due, or to waive the right so to declare on such terms and conditions as such majority shall deem proper, or may annul or reverse the election of the trustees, provided that no action of the trustees or bond-holders shall extend to, or be taken to effect any subsequent de-
66 fault, or to impair the rights resulting therefrom.

Fifth.—The party of the first part shall, from time to time, and at all time hereafter, and as often as thereunto requested by the trustees, execute, deliver and acknowledge all such further deeds, conveyances and assurances, in the law for the better assuring the trustees, upon the trusts herein expressed, the said railroad and the equipments and appurtenances hereinbefore mentioned, or intended so to be conveyed, and all franchises now held or hereafter acquired, as by the trustees, or by their counsel learned in the law, shall be reasonably advised, devised or required.

Sixth.—The trustees shall have full power in their discretion, when in their judgment it is for the best interests of the said party of the first

part, and provided they unite in the opinion that the security of the aforesaid bond or bonds is not thereby materially impaired or lessened, and upon the written request of the party of the first part, to convey by way of release or otherwise to the persons designated by the said company any lands acquired or held for the purposes of stations, depot shops, or other buildings, and shall also have power to convey, as aforesaid, on like request, any lands or property which in the judgment of the trustees shall not be necessary for use in connection with the said railroad, or which may have been held for a supply of fuel,
67 gravel or other materials; and also to convey as aforesaid, on like request, any lands not occupied by the track which may become disused by reason of a change of the location of any station house, depot, shop, or other building connected with the said railroad, and such lands occupied by the track and adjacent to such station house, depot, shop or other building as the said company may deem it expedient to disuse or abandon by reason of such change, and to consent to any such change and to such other changes in the location of the tract or depot or other buildings as in their judgment shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect; but any lands which may be required for permanent use in substitution for any so released, shall be conveyed to the trustees upon the trusts of these presents, and the trustees shall also have full power to allow the said company from time to time to dispose of, according to its discretion, such portions of the equipments, machinery and implements at any time held or acquired for the use of the said railroad as may have become unfit for such use, replacing the same by new, which shall then become subject to the operation of these presents, and which shall be expressly conveyed to said trustees, subject to such operation on their demand.

68 Seventh.—The said party of the first part does further covenant and agree that it will, by proper acts and proceedings, secure and provide for the payment or redemption of the bond or bonds hereby secured by means of a sinking fund.

Eighth.—At any sale of the aforesaid property or any part thereof made to enforce the lien created by these presents, pursuant to the power herein granted, or by judicial authority, the said trustees may bid for and purchase, or cause to be bid for and purchased, the property so sold, on behalf of all the holders of the bond or bonds secured hereby then outstanding, in proportion of the respective interest of such holders; provided that if all the property hereby conveyed be sold, as aforesaid, the price at which the purchaser herein authorized may be made shall not exceed the whole amount of the bonds then outstanding, with the interest accrued thereon, in behalf of which the said purchase shall be made; and if but a portion of the said property shall be sold, it shall be at such price as shall be in the judgment of the trustees reasonable.

Ninth.—If the party of the first part shall well and truly pay the principal of the said bonds and every one of them and all interest thereon, when the same shall become payable, according to the tenor of the said bonds and the coupons issued therewith, and shall well and truly observe, perform, and keep, all and singular, the several things herein re-

quired to be by it performed, or kept, according to the true in-
69 tent and meaning of these presents, then and in that case all the estate, right, title and interest of the said parties of the second part, the survivors of them, and their or his successor or successors in the trust hereby created shall cease, determine, and become void; otherwise, the same shall be and remain in full force and virtue.

Tenth.—It is hereby declared and agreed that it shall be the duty of the trustees to execute the power of entry hereby granted, or the power of sale hereby granted, or both, or to take appropriate proceedings in equity or at law to enforce the rights of the bond-holders under these presents, upon requisition in writing as hereinafter specified, viz.:

1. If the default be as to the interest or principal of any of the bond or bonds aforesaid, such requisition upon the said trustees shall be by holders of not less than twenty-five per centum of the said bond or bonds then outstanding, and upon such requisition and a proper indemnification by the persons making the same to the trustees against the costs and expenses to be by them incurred, it shall be the duty of the trustees to enforce the rights of the bond-holders under these presents by entry, sale or legal proceedings as they, being advised by counsel learned in the law, shall deem most expedient for the interest of all the holders of the said bond or bonds.

70 2. If the default shall be in the omission to comply with any other provision herein contained to be performed or kept by the said company, then and in such case the requisition shall be by the holders of fifty per centum of the bond or bonds then outstanding; but such duty of the trustees shall be at all times subject to the power hereby declared of a majority in interest of the holders of the said bond or bonds by requisition in writing, signed by such majority, to instruct the said trustees to waive such default, or upon adequate indemnity, as aforesaid, to enforce their rights by reason thereof; provided, that no action of the trustees or bondholders, or both, in waiving such default or otherwise, shall extend to or be taken to affect any subsequent default, or to impair the rights resulting therefrom.

Eleventh.—It is hereby expressly agreed that in case of the death, resignation, incapacity, or removal of any or either of the parties of the second part, then it shall and may be lawful, and the remaining, acting, surviving or competent trustee and the party of the first part are hereby jointly empowered to elect and appoint, by an instrument in writing, duly executed by each of such parties, a competent person to fill the vacancy created in manner aforesaid; and that such person so appointed trustee, on his acceptance of such appointment, shall have and possess, and be vested with the same rights and powers, as trustee, as he would have had and possessed, or been vested with, had he been
71 originally made a party of the second part hereto, and shall perform the same duties in all respects, and until such appointment shall be so made in manner aforesaid, and notwithstanding any vacancy as aforesaid, said remaining, surviving, acting or competent trustee shall have full power and authority to execute each and all the trusts hereby created; and his acts in the premises shall be as legal, valid, and effectual in all respects and to all intents and purposes as if

the same had been done and performed by both the parties hereto of the second part. And if, for any reason, the said surviving trustee, and the party of the first part hereto, should fail to unite in the appointment of a trustee as before required, within the space of thirty days after such vacancy occurs, then and in that case it shall be the duty of the secretary of the company to call a meeting of the bond-holders, by printed notice, published in two of the public newspapers of the city of New York, calling such meeting of the bond-holders to be held in the said city, not less than thirty days after the first publication of said notice, for the purpose of filling such vacancy. At the time and place specified in such notice, the holders of said bond or bonds, at such meeting, shall proceed to elect a suitable person to act as such trustee, to fill said vacancy, and a majority in interest of said bondholders so attending said meeting, or legally represented thereat, shall be competent
72 to elect a new trustee; and the person so elected shall immediately on such election, and on his acceptance in writing of such trust, become vested with all the estate, trusts, rights, powers, and duties of the trustee in whose place he shall have been elected. And in case such appointment shall be made in manner aforesaid, or in case of such election as aforesaid, the said party of the first part hereby covenants to make, execute, and deliver such other or further instruments, deeds, indentures or assurances as may be necessary to enable the person or persons so appointed or elected to execute the trusts hereby created and declared as fully and perfectly, in all respects, as he or they could have executed the same if originally made a party or parties of the second part to this indenture.

Twelfth.—It is further agreed that neither of the said trustees, their survivors or successors, shall be answerable for the acts, omissions or defaults of the other or of any agent employed by them, nor for anything short of gross negligence, or willful default in the discharge of other duties.

In witness whereof the said party of the first part caused these presents to be executed by its president and attested by its secretary, and its corporate seal to be hereunto attached; and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

73 THE ST. LOUIS & SOUTHEASTERN RAILWAY CO.

By EDWARD F. WINSLOW, *President.*

[L. S.] Attest: CHARLES W. GARDINER, *Secretary.*

State of Missouri, county of St. Louis, *ss.*

Be it remembered that on the third day of August, A. D. 1872, personally came and appeared before me Frederick C. Schoenthaler, Clerk of the County Court of St. Louis county, Edward F. Winslow, President of the St. Louis and Southeastern Railway Company, personally known to me to be such person, and a credible witness, who, having first been duly sworn, declares and says that he is President of the St. Louis and Southeastern Railway Company, that the foregoing instrument was ex-

ecuted by him as such officer, and attested by the Secretary of said company, that the seal attached is the corporate seal of the said company, and that such instrument and execution was authorized by the stockholders and ratified and ordered by the Board of Directors of said corporation.

In testimony whereof I have hereunto set my hand and affixed the seal of the said County Court on the day and date first above written.

[L. S.] F. C. SCHOENTHALER, *Clerk County Court.*

State of Illinois, county of St. Clair, *ss.*

74 I, James M. Roeder, Clerk of the Circuit Court, and ex-officio Recorder within and for the county and State aforesaid. do hereby certify that the foregoing mortgage was filed for record this 15th day of Ootober, A. D. 1872, and duly recorded in Book R 5, page 79 and following.

Witness my hand and the seal of the said court the day and year above written.

GEO. M. ROEDER, *Clerk,*

[L. S.] per E. L. ROEDER, *Deputy.*

Also, a mortgage on trust deed from the St. Louis and Southeastern Railway Company to the interpleaders in trust, to secure the bonds of said company in the amount of $21,000 per mile, with interest coupons attached, which conveyance covers all the railroad of said company, and all its branches, and all its property, real and personal, and the rents, tolls, issues and profits thereof; and empowers said trustees to enter upon and take possession of all of said property upon any default being made in the payment of said bonds or coupons, and to sell the same and apply the proceeds to the payment of the said debt. This mortgage or trust deed was made October 1, 1872, is in due form, and was
75 duly recorded in said county October 14, 1872, one day previous to the mortgage above mentioned.

Also, a written agreement between said St. Louis and Southeastern Railway Company and said interpleader, setting forth that the mortgage first above mentioned from said St. Louis and Southeastern Railway Company to said interpleaders, upon said O'Fallon Branch, to secure $150,000, was intended to be and was a lien prior to said last named mortgage on the said St. Louis and Southeastern Railway and all its branches, to secure $21,000 per mile, and that it had been inadvertently recorded prior to the last named mortgage. This agreement is dated October 25, 1872, and was duly recorded in said county October 25, 1872.

Also, a deed of trust executed by the Belleville and O'Fallon Railroad to Charles W. Thomas, as trustee, conveying to him the property in question, being the railroad of said company from Belleville to O'Fallon, and all the property, real and personal, then held or thereafter to be acquired by said company, and all the rents, tolls, issues and profits thereof, in trust, to secure eight bonds of the company, each for $10,000, dated June 13, 1871, and bearing interest at the rate of 8 per cent. per annum, and to be due and payable, principal and interest, on the twentieth day of June, A. D. 1871; and authorizing said trustee, in default

of the payment of said bonds or any of them, to sell the property conveyed, and make a deed conveying all the title of said company
76 in and to the property to the purchaser. This conveyance bears date June 13, 1871, and is in due form of law, and was properly recorded in said county June 26, 1871.

Also, a trustee's deed from Charles W. Thomas to the defendants in this attachment, made under the power contained in the last named trust deed, reciting default in payment of said bonds, due notice of sale, and sale to said defendants, all in proper and legal form. This deed bears date July 26, 1871, is sufficient for the purpose for which it was made, and was duly recorded in said county April 3, 1875.

The interpleaders also offered in evidence a deed purporting to be from the defendants, and their waiver to the interpleaders for the property in question, bearing date January 4, 1876, and duly recorded in said county April, 1876. The said deed was in proper form. The deed and acknowledgments thereto were in the words and figures as follows:

This indenture, made this fourth day of January, 1876, between Edward F. Winslow, of Cedar Rapids, Iowa, and Laura B., his wife, and James H. Wilson, of ————————, and Ella, his wife, parties of the first part, Philo C. Calhoun and George Opdyke, as trustees under a certain mortgage bearing date August 1, 1872, made by the St. Louis and Southeastern Railway Company to them in trust, to secure
77 certain bonds of the said railway company, described as its first mortgage convertible bonds, branch series, parties of the second part; and the St. Louis and Southeastern Railway Company, consolidated, of the States of Illinois, Indiana, and Tennessee, party of the third part.

Witnesseth: Whereas, during the years 1871 and 1872, Edward F. Winslow and James H. Wilson, parties hereto of the first part, were respectively President and Vice-President of the St. Louis and Southeastern Railway Company, of which the party hereto of the third part is the successor.

And whereas, in the year 1871, the said St. Louis and Southeastern Railway Company was desirous of building certain branches within the County of St. Clair and State of Illinois, more especially a branch upwards of six miles in length, extending from the City of Belleville to the town of O'Fallon; and for the purpose of securing the right of way for the said branch railway to O'Fallon, certain proceedings were taken to condemn the railway line and property of a certain corporation known as the Belleville and O'Fallon Railroad Company, and at the same time, for the sake of greater assurance, a certain mortgage theretofore existing upon the property of the said last mentioned railway company was foreclosed, and a conveyance thereof under such foreclosure was taken to the said Winslow and Wilson, parties of the first part, to be
78 held by them solely for the benefit of the said St. Louis and Southeastern Railway Company.

And whereas, for the purpose of securing the necessary funds to build the said branch railway, the said St. Louis and Southeastern Railway Company did make and issue its certain mortgage convertible bonds,

branch series, to the extent of one hundred and five thousand dollars, at the par value thereof, and in order to secure the same did make and execute unto the parties hereto of the second part, its certain deed of trust, bearing date the 1st of August, 1872, and recorded in the Clerk's office for the county of St. Clair, State of Illinois, on the 15th day of October, 1872, in Book R 5, page 79; and upon the pledge of the bonds so secured and issued, moneys were obtained by the said railway company for the purpose of building the said branch, which conveys were so in fact applied, and the said branch railways actually constructed and put into operation by the use of said moneys.

And whereas, the said St. Louis and Southeastern Railway Company became, on the 1st day of October, 1872, consolidated with certain other corporations in States Indiana, Kentucky and Tennessee, under the name of the St. Louis and Southeastern Railway Company (consolidated), the party thereto of the third part, thereby assuming all the obligations of the original corporations so consolidated, and the
79 said consolidated company made its certain consolidated mortgage or deed of trust to P. C. Calhoun and George Opdyke, as trustees to secure its certain bonds known as consolidated mortgage bonds, which mortgage was recorded at the said Clerk's office for the county of St. Clair and State of Illinois, on the 14th day of October, 1872, although in fact none of the bonds secured by the said consolidated mortgage were issued after November 1st, 1872.

And whereas, the said St. Louis and Southeastern Railway Company (consolidated), by its certain declaration and agreement bearing date October 25th, 1872, and recorded in said Clerk's office for the county of St. Clair and State of Illinois, on the 25th day of October, 1872, in Book R, page 89, did make known and declare that the lien of the aforesaid mortgage, bearing date the first of August, 1872, to the parties hereto of the second part, was in fact prior and superior to the lien of the aforesaid consolidated mortgage bearing date October 1st, 1872.

And whereas, the parties hereto of the first part, are about to make the conveyance to the party hereto of the third part, of all their right, title and interest by reason of the aforesaid conveyance to them of the property covered by the aforesaid deed of trust, of the Belleville and O'Fallon Railroad Company.

And whereas, for the purpose of more effectually securing the
80 above described bonds, known as the first mortgage convertible bonds of the St. Louis and Southeastern Railway, branch series, the said party of the third part has requested the said parties of the first part to make a conveyance by way of mortgage to the parties hereto of the second part of the property hereinafter described.

Now, therefore, in consideration of the premises, and one dollar, to them in hand paid, the receipt whereof is hereby acknowledged, the parties hereto of the first part, do hereby give, grant, bargain, sell, transfer and convey unto the said Philo C. Calhoun and George Opdyke, as trustees, under a certain mortgage bearing date August 1, 1872, made by the St. Louis and Southeastern Railway Company, to them in trust to secure certain bonds of the said Railway Company described as its

first mortgage convertible bonds, branch series, all the right, title and interest of the parties hereto of the first part, in and to the following described property, franchises, and rights of action, namely—All the rights, privileges and franchises of the "Belleville and O'Fallon Railroad Company," given it by its charter, all the railroad formerly of the
81 said Belleville and O'Fallon Railroad Company, constructed or to be constructed from the City of Belleville to the town of O'Fallon, in the county of St. Clair and State of Illinois, including all the railways, ways and rights of way, depot grounds and other lands, and all tracks, bridges, viaducts, culverts, embankments and other structures, and all depots, station-houses, engine-houses, car-houses, wood-houses, freight-houses and other buildings, and all machine shops, and other shops, whether now held or hereafter acquired for use in connection with the said railroad or the business thereof, and including also, all locomotives, cars, tenders, and other rolling stock or equipments, and machinery, fuel and materials for constructing, operating, repairing or replacing said railroad or any part thereof, or any of its equipments or appurtenances, whether now held or hereafter acquired by the said parties of the first part, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in wise
82 appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in and to the same and every part thereof. To have and to hold the above described property, and the appurtenances unto the said parties of the second part, said Calhoun and Opdyke, the survivor of them, and their or his heirs, successor as trustees for such persons and corporations as shall be the holders of the aforesaid branch series of bonds. This conveyance is made, however, upon the following conditions, viz: that if the said St. Louis and Southeastern Railway Company (consolidated) shall well and truly pay and discharge, according to the terms thereof, the aforesaid one hundred and five thousand dollars ($105,000), of first mortgage convertible bonds (branch series), together with the interest accrued, and to accrue thereon, this conveyance shall be void, otherwise to be of full force and effect. And it is also agreed that this conveyance is made and accepted upon the same terms, conditions and provisions as are contained in the above described mortgage, made by the said party of the third part, to the said parties of the second part, to secure the said branch series bonds, dated August 1, 1872, and recorded in the office of the Clerk of the county of St. Clair, Illinois, on the 15th day of
83 October, 1872, in Book R 5, page 79, and that this instrument shall be construed as to the effect thereof, and as to the powers and duties of the said trustees, as if the provisions of the said last mentioned mortgage were texterally inserted herein. And the said party of the third part indicates its request that the parties of the first part shall make this instrument by joining in the execution hereof.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals, and the said party of the third part has caused these presents to be executed by its Vice-President,

and attested by its Secretary under its corporate seal, the day and year first above written.

In presence of WM. S. OPDYKE, as to J. B. W.
[L. S.]

JAMES H. WILSON.
ELLA WILSON.
EDWARD F. WINSLOW.
LAURA B. WINSLOW.

State of New York, City and County of New York:

On this day personally appeared before me James H. Wilson and Ella Wilson, his wife, to me personally known, and known to me to be the parties who executed the foregoing instrument and they severally acknowledge to me that they executed the same for the purposes therein set forth.

84

In witness whereof I have hereunto affixed my hand and seal of office, ——— in the City of New York, on this 27th day of March, A. D. 1876.

(36) J. EUGENE FLAADIN, Notary Public.
New York City and County.

State of Iowa, Linn County, *ss.*

Before me ——— a Notary Public, in and for said county, appeared Edward F. Winslow and Laura B. Winslow, his wife, who signed the foregoing instrument, and who acknowledged to me that the same was their voluntary act and deed for the purposes therein set forth.

Given under my hand and Notarial Seal this 20th day of March, 1876.
[L. S.] P. MARTEL, Notary Public.

State of Iowa, Linn County, *ss.*

I, J. L. Crawford, Clerk of District Court in and for said Linn County, do hereby certify that P. Martel is a Notary Public in said county, duly commissioned and sworn, whose acts as such are entitled to credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at ——— Marion, in said county, this 20th day of March, A. D. 1876.

85

[L. S.] J. L. CRAWFORD, Clerk.

And plaintiff by its counsel objected to the reading of said deed in evidence, because said acknowledgments failed to state that the persons executing the deed were personally known to the acknowledging officer, and because the deed did not tend to prove the issue made and was irrelevant, but the Court overruled the said objection, and allowed the deed to be read in evidence, and to this ruling and decision of the Court, plaintiff by its counsel at the time excepted.

The interpleaders also offered in evidence a deed purporting to be from the defendants and their wives, to the St. Louis and Southeastern Railway Company (consolidated), which bears date January 5, 1876, and was duly recorded in said county April, 1876. The deed purports to convey the property in question, and the deed and acknowledgments thereto are as follows:

Deed from Winslow & Wilson to St. Louis & Southeastern Railway Co.

This Indenture, made this fifth day of January, one thousand eight hundred and seventy six, between Edward F. Winslow of Cedar Rapids, Iowa, and Laura B., his wife, and James H. Wilson of ——— and Ella, his wife, parties of the first part; the St. Louis and Southeastern Railway Company (consolidated) of the States of Illinois,
86 Indiana and Tennessee, party of the second part: Witnesseth: Whereas, during the years 1871, 1872, Edward F. Winslow and James H. Wilson, parties hereto of the first part, were respectively President and Vice-President of the St. Louis and Southeastern Railway Company, of which party hereto of the second part is the successors. And, whereas, in the year one thousand eight hundred and seventy one, the said St. Louis and Southeastern Railway Company was desirous of building certain branches, within the County of St. Clair, and State of Illinois, more especially a branch, upwards of six miles in length, extending from the City of Belleville to the town of O'Fallon, and for the purpose of securing the right of way for the said branch railway to O'Fallon, certain proceeding were taken to condemn the railway line and property of a certain corporation, known as the Belleville and O'Fallon Railroad Company; and at the same time, for the sake of greater assurance, a certain mortgage heretofore existing upon the property of the said last mentioned Railway Company was foreclosed, and a conveyance thereof, under such foreclosure, was taken to the said Winslow and Wilson, parties of the first part, to be held by them solely for the benefit of the said St. Louis and Southeastern Railway Company. And whereas, for the purpose of securing the necessary funds to build the said Branch Railway, the said St. Louis and Southeastern Railway Company,
87 did make and issue its certain first mortgage convertible bonds, branch series, to the extent of one hundred and five thousand dollars at the par value thereof, and in order to secure the same, did make and execute unto George Opdyke and Philo C. Calhoun, of the City of New York, as trustees, its certain deed of trust bearing date the first of August, 1872, and recorded in the Clerk's office for the County of St. Clair, State of Illinois, on the 15th day of October, 1872, in Book R 5, page 79, and upon the pledge of the bonds so secured and issued, moneys were obtained by the said Railway Company for the purpose of building the said branch, which moneys were so in fact applied, and the said branch railway actually constructed and put in operation by the use of the said moneys. And whereas, the said St. Louis and Southeastern Railway Company became on the first day of October, 1872, consolidated with certain other corporations in the States of Indiana, Kentucky and Tennessee, under the name of the St. Louis and Southeastern Railway Company (consolidated), the party hereto of the second part hereby assuming all the obligations of the original corporations as (consolidated), and whereas, it has become advisable that the parties hereto of the first part should make a conveyance to the party of the second part, of all their rights, title and interest, by reason of the aforesaid conveyance to them of the property covered by the aforesaid

deed of trust of the Belleville and O'Fallon Railroad Company,
88 and whereas, at the request of the party hereto of the second part, the said parties of the first part have heretofore made a conveyance by way of mortgage to the said Opdyke and Calhoun, as trustees of the aforesaid mortgage upon the property hereinafter described, for the purpose of more effectually securing the above described bonds, known as the first mortgage convertible bonds of the St. Louis and Southeastern Railway Company, branch series: Now, therefore, in consideration of the premises, and of one dollar, to them in hand paid, the receipt whereof is hereby acknowledged, the parties of the first part do hereby give, grant, bargain, sell, transfer, convey, quit-claim and forever release unto the said St. Louis and Southeastern Railway Company (consolidated), party hereto of the second part, all the property, rights and franchises of the Belleville and O'Fallon Railroad Company, conveyed to the said Winslow and Wilson by Charles W. Thomas, as trustees, by deed bearing date July 26, 1871, and recorded in the office of the Clerk of the County of St. Clair, State of Illinois, on the —— day of ———, 187—, in book —— by the following description: All the rights, privileges and franchises of the Belleville and O'Fallon Railroad Company, given it by its charter: All the railroad formerly of the said Belleville and O'Fallon Railroad Company, constructed or to be constructed, from the said City of Belleville to the town of O'Fallon, in the County of St. Clair and State of Illinois, including all
89 the railways, ways and rights of way, depot grounds and other lands, and all the tracks, bridges, aqueducts, culverts, embankments and other structures, and all depots, station-houses, engine-houses, car-houses, wood-houses, freight-houses and other buildings, and all machine-shops and other shops, whether now held or hereafter acquired for use in connection with the said railroad, or the business thereof, and including also all locomotives, tenders, cars and other rolling stock or equipments and machinery, fuel and materials for constructing, operating, repairing or replacing said railroad or any part thereof, or any of its equipments or appurtenances, whether now held or hereafter acquired by the said parties of the first part, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining: and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all the estate, rights, title, interest, property, claim and demand, whatsoever, as well in law as in equity of the said parties of the first part, of, in and to the same and every part thereof: And also, all the right, title and interest of the said parties of the first part, or either of them, in, to or about the premises aforesaid, or in anywise effecting the lands, rights of way, depot-grounds or appurtenances of the said O'Fallon Branch of the St. Louis and Southeastern Railway Company (consolidated), to have and to hold the above described property and the appurtenances unto the said party of the second part, its successors and assigns, forever; subject,
90 however, to the mortgage heretofore given by the parties of the first part to said Opdyke and Calhoun as trustees aforesaid, at the request of the party of the second part, to secure the payment of the above described branch series bonds. And the said Edward F. Winslow

and James H. Wilson, for themselves and their heirs, executors and administrators, do hereby covenant, promise and agree to and with the said party of the second part, its successors and assigns, that they have not made, done, committed, executed or suffered any act or acts, thing or things, whatsoever, whereby or by means whereof the above mentioned and described promises, or any part or parcel thereof now are, or at anytime hereafter, shall or may be impeached, charged or incumbered in any manner or way whatsoever, except as aforesaid.

In witness whereof the parties of the first part have hereunto set their hands and seals, the day and year first above written.

JAMES H. WILSON,
ELLA WILSON,
EDWARD F. WINSLOW,
LAURA B. WINSLOW.

In presence of WILLIAM S. OPDYKD, as to J. H. W.,
WM. SELLERS, as to E. W.

State of Iowa, Linn County, *ss.*

91 Before me, P. Martel, a Notary Public in and for said County, appeared Edward F. Winslow and Laura B. Winslow, his wife, who signed the foregoing instrument and acknowledged to me that the same was their voluntary act and deed for the purpose therein set forth.

Given under my hand and notarial seal this 20th day of March, A. D. 1876.

[L. S.] P. MARTEL, Notary Public.

State of Illinois, Linn County, *ss.*

I, J. L. Crawford, Clerk of District Court in and for said County, do hereby certify that P. Martel, Esq., is a Notary Public in said County, duly commissioned and sworn, and whose acts, as such are entitled to credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Marion, in said County, this 20th day of March, A. D. 1876.

[L. S.] J. L. CRAWFORD, Clerk.

State of New York, City and County of New York, *ss.*

Be it remembered, that on the twenty-seventh day of March, A. D. 1876, before me, the subscriber, a Notary Public in and for the said County, duly commissioned and sworn, personally appeared Ella,
92 the wife of James H. Wilson, proven to me satisfactorily to be the identical person described in, and who acknowledged that she executed the foregoing instrument for the use and purposes therein mentioned as her voluntary act and deed.

In witness whereof, I have hereunto set my hand and seal of my office the year and day first above mentioned.

[L. S.] JOHN C. CONNOR, Jr., Notary Public.

State of New York, City and County of New York, *ss.*

I, William Walsh, Clerk of the City and County of New York, and

also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, do hereby certify that John C. Connor, Jr., whose name is subscribed to the certificate of the proof or acknowledgments of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment, a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the hand writing of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is exe-
93 cuted and acknowledged according to the law of the State of New York.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 28th day of March, 1876.

[L. S.] WILLIAM WALSH, Clerk.

And plaintiff by its counsel, objected to the reading of said deed in evidence, because said acknowledgments fail to state that the persons executing the deed were personally known to the acknowledging officer, and because the deed did not tend to prove the issue and was irrelevant, but the Court overruled the said objections and allowed the deed to be read in evidence, and to this ruling and decision of the Court, plaintiff by its counsel at the time excepted.

And it was proved by said interpleaders, that in pursuance of the prayer of a certain bill in chancery to foreclose said mortgage or deed of trust for $21,000 per mile, filed in said Court on the 21st day of October, 1874, by the interpleaders as trustees in said mortgage, made to them to secure $21,000 per mile of the bonds of said St. Louis and Southeastern Railway Company against said Company, setting forth a default in the payment of the interest on said bonds, and praying for a foreclosure of said mortgage and the appointment of a receiver to take possession of all and singular the property of the said Company
94 conveyed by said mortgage, and to operate its railroad and collect its tolls and incomes pending said litigation: The said Court appointed one Jediah F. Alexander, receiver as aforesaid, and put him into possession of all said property as such receiver, including said O'Fallon Branch Railroad. That said appointment was made Oct. 21, 1874, and that said receiver went at once into such possession, and so remained to this time.

And now the interpleaders offered in evidence a consolidated mortgage bond, so called, of said St. Louis and Southeastern Railway Company consolidated, of which plaintiff held $80,000 as collateral to said notes of said Railway Company, which bond is in words and figures as follows, to-wit:

Consolidated Mortgage Bond of St. Louis and Southeastern R. R. Co.

$500 UNITED STATES OF AMERICA. $500

States of Illinois, Kentucky and

[Vignette.]

Indiana, 8094. Tennessee.

The St. Louis and Southeastern Railroad Company (consolidated) hereby acknowledges itself indebted to George Opdyke and Company, or bearer, in the sum of five hundred dollars, which sum it promises to pay to the holder thereof, in gold coin of the United States (equal to the present standard) on the first day of November, in the year 1902, at its office or agency in the City of New York, with interest thereon at the rate of seven per centum per annum, on the first day of
95 February and August in each year, on the surrender of the annexed coupons as they severally fall due: such interest to be payable at its office or agency, either in New York, in U. S. gold coin, or in Amsterdam, Berlin or Frankfort on the Main, at the option of the holder, in the currency of the respective countries, as specified in the annexed coupons. In case of default for the period of four months in the payment of interest upon this bond, the principal of this bond shall thereupon become due and payable, with the effect provided in the deed of trust hereinafter mentioned. This bond is one of a series of bonds issued, and to be issued to an amount not exceeding the amount of twenty-one thousand dollars per mile of track of railroad, of the said Company, as fully set forth in the deed of trust hereinafter named: all of which bonds are of like tenor herewith, except in amount and in time of payment of interest: The payment of the said series of bonds is secured by a trust deed or mortgage, of even date herewith, made by the said St. Louis and Southeastern Railway Company (consolidated) to George Opdyke and Philo C. Calhoun of New York, as trustees, and conveying to such trustees, among other things, the entire railways of the said Company from East St. Louis, in the State of Illinois, and running through the State of Illinois, Indiana, Kentucky and Tennessee to the City of Nashville, now including, with its branches, a total
96 length of about 420 miles, together with the franchises, privileges, tolls, income, property and profits of the said Company. The payment of the principal of this bond is moreover secured by provisions in the said deed of trust for a sinking fund, to commence on October 1st, 1873, the annual contributions to which are to be equal to two and one half per centum of the gross earnings of the said Company for the current year, and this bond is redeemable by said sinking fund in the manner declared in the said deed. Sufficient bonds of this issue having been deposited in trust, to secure all issues of bonds of the Companies by the consolidation of which this Company was formed, this series of consolidated bonds represents the only and entire funded debt of the St. Louis and Southeastern Railway Company (consolidated). This bond shall not become obligatory until authenticated by signatures of the trustees.

In testimony whereof, the said Company has caused its corporate seal to be hereunto affixed and these presents to be executed by its president and attested by its secretary, this first day of October, A. D. 1872.

THE ST. LOUIS AND SOUTHEASTERN RAILROAD COMPANY
(consolidated.)

Three months' interest payable with this bond.

E. F. WINSLOW, *President.*

(Attest) CHARLES W. GARDNER, *Secretary.*

97 (58 coupons attached, each for $17.50 ; first coupon attached due February 1, 1874. Remainder of coupons due at successive intervals of six months).

And now the interpleaders offered in evidence the following petition which was filed in the chancery suit above mentioned on the 5th day of February, 1826.

Petition of Peoples Bank of Belleville for leave to levy execution.

In the United States Circuit Court, for the Southern District of Illinois.

Philo C. Calhoun et al.
vs.
The St. Louis and Southeastern Railway Company (consolidated). } *In Chancery.*

And now comes the Peoples Bank of Belleville, and petitioning shows unto the Court here—That at the January Term A. D. 1876, of the Circuit Court, within and for the County of St. Clair and State of Illinois, in pursuance of leave of this Court first had and obtained, it brought suit against the St. Louis and Southeastern Railway Company (consolidated), upon a certain promissory note of said Company dated December 1st, 1873, for $40,000, and payable one year after its date to petitioner, at petitioner's bank, and bearing interest at the rate of ten per cent. per annum. That on the 18th day of January, A. D. 1876, petitioner recovered judgment on said note in said St. Clair Circuit Court against said Company for the sum of forty-six thousand five hundred and twenty-two 20-100 dollars and costs of suit.

98 That said Company in order to further secure the payment of said note to said Bank, at the time said note was delivered to said Bank, delivered also its (consolidated) mortgage bonds to the amount of $80,000 which now have but small value. That said bonds were left with petitioner as collaterals to secure the payment of said money, and have been forfeited to petitioner on account of the default of said Company in failing to pay said note at its maturity. That petitioner believes that said bonds would realize most at a public sale which it is willing should be made by a public officer under an execution issued on said judgment. That said bonds have never been in the hands of the receiver appointed by this Court in said cause but have laid in petitioner's vault since said note was made.

In consideration of the premises, and out of respect for the orders of this Court in said cause, petitioner asks leave to direct a levy of execution upon said bonds according to the law of this State, and leave for the Sheriff of said county to sell the same under execution upon said judgment, and as in duty bound, &c.

THE PEOPLES BANK OF BELLEVILLE,
by C. W. and E. L. THOMAS, Att'ys.

State of Illinois, St. Clair County, *ss.*

Albert G. Badgley, being first duly sworn says, upon his oath, that he is the cashier of the Peoples Bank of Belleville, and that the

99 allegations of fact contained in the above petition are true.

ALBERT G. BADGLEY, *Cashier.*

Subscribed and sworn to before me this third day of February, A. D. 1876. CHARLES BECKER, *Clerk,*

[L. S.] by GEORGE W. SCHUESSLER, *Deputy.*

And the plaintiff by its counsel, objected to the reading of the said petition in evidence because it was not relevant to the issue on trial and only served to encumber the record, but the Court overruled the objections and allowed the petition to be read in evidence, and to this decision of the Court the plaintiff, by its counsel, at the time excepted. And now the interpleaders offered and read in evidence the following petition which was filed in the said suit on the —— day of ——— 187 .

Petition of Peoples Bank of Belleville for leave to sue Receiver.

Circuit Court of the United District of Illinois, *ss.*

At Chambers, December 10, 1875.

Philo C. Calhoun and George Opdyke
vs.
St. Louis and Southeastern Railway Company (consolidated).

Petition of the Peoples Bank of Belleville for leave to sue the
100 receiver of defendant's property.

The Peoples Bank of Belleville shows to the Court that it is at present the legal holder of a certain promissory note made by the defendant for $20,000, dated December 1, 1873, and payable two years after date to the order of Winslow and Wilson and endorsed by Winslow and Wilson, J. F. Alexander, John B. Hunter and Wm. S. Smith as guarantors, as your petitioner is advised: and that petitioner is also the legal holder of another promissory note made by defendant for $20,000, dated December 1, 1873, and payable to the order of Winslow and Wilson two years after its date, and indorsed by Winslow and Wilson and J. F. Alexander as guarantors, as your petitioner is advised.

And that petitioner is also the legal holder of one other certain promissory note of defendant for $40,000, dated December 1, 1873, payable to petitioner's order one year after its date with interest at the rate of ten per cent. per annum, interest payable semi annually, upon which $2,000 interest has been paid. In consideration of the premises and as petitioner's rights will be impaired unless judgment is procured against the maker and indorsers or guarantors aforesaid, the petitioner asks the leave of this honorable Court, for itself and its indorser or indorsers, should there be any, to bring suit against said company in some Court of law having jurisdiction, and as it duty bound, &c.

THE PEOPLES BANK OF BELLEVILLE,
by C. W. THOMAS, its Solicitor.

101 And the plaintiff, by its counsel, objected to the reading of said petition in evidence, because it was not relevant to the issue on trial, but the Court overruled the plaintiff's objections and allowed

the petition to be read in evidence, and to this decision of the Court the plaintiff by its counsel excepted. And now the interpleaders offered in evidence the following order.

Order restraining Peoples Bank of Belleville and Sheriff from prosecuting a certain suit.

In the Circuit Court of the United States, for the Southern District of Illinois.

Wednesday, March 29th, A. D. 1876.

Present, Hon. Samuel H. Treat, District Judge.

Philo C. Calhoun and George Opdyke
vs.
St. Louis and Southeastern Railway Company (consolidated). } *In Chancery.*

The application for an injunction in this case is set for hearing on the fourth Tuesday of April next, and it is ordered that the Peoples Bank of Belleville, Illinois, and Herman G. Weber, sheriff of St. Clair county, Illinois, their servants, agents and attorneys, be each of them restrained from further prosecuting a certain suit in attachment, commenced in the Circuit Court of St. Clair county, Illinois, by said Peoples Bank of Belleville against Edward F. Winslow and James H. Wilson, and be also restrained from interfering in any way or
102 disturbing the possession of the receiver of the St. Louis and Southeastern Railway Company (consolidated), in and to the O'Fallon Branch of said St. Louis and Southeastern Railway Company (consolidated), until said application is heard and decided.

And the plaintiff by its counsel, objected to the reading of the order in evidence, because it was not relevant to the issue, because it purported to be merely provisional, and because it was not preceded by any pleadings upon which it could have been based, but the Court overruled the said objections and permitted the order to be read in evidence, and to this decision of the Court the plaintiff, by its counsel, at the time excepted.

And now the interpleaders offered in evidence the following paper:

Letter from Thomas to Alexander.

Office of C. W. AND E. L. THOMAS, Attorneys,
Belleville, Ill., May 8th, 1873.

HON. J. F. ALEXANDER, St. Louis, Mo.

Dear Sir:—In pursuance of your verbal request of to-day, I send you the plan of the campaign instituted by the St. L. and S. E. Co., under our advice, to procure title to the road-bed of the O'Fallon R. R. without becoming liable to pay the land damages of claimants,
103 over whose land the O'Fallon road is built.

When we commenced operations, the difficulties of the undertaking were not underated, but we thought we saw the way through. The Southeastern Co. appeared upon the scene after the O'Fallon Co. had graded its road. It was found that the O'Fallon Co. had con-

demned, that appeals had been taken to the Circuit Court and judgments rendered there, that the judgments were void, unless taken to the Supreme Court by the plaintiffs and reversed. The Statute, however, at that time, required that no company could enter land which had been condemned, unless it first executed a bond to pay all damages that might be awarded. The Southeastern Co. saw the road graded, and it had a right to suppose that such a bond had been given, and that it could in no event be held liable.

If no such bonds were given it was the fault of the land-owners, and they cannot take any advantage of their own negligence. A land owner stands in no better case than one who holds a vendor's lien. He cannot set up his claim to compensation for his land against an innocent purchaser, whom his own negligence in allowing the original condemning Co. to enter and hold out to the world its ownership without any steps being taken to prevent it, has induced to come in and buy, and whom he permits, without any interruption, to proceed and complete the unfinished road at great expense.

104 The principle upon which we advised the course that was taken was announced by the Supreme Court of Wisconsin, in 1st American Rep., p. 203 (24 Wis. R. 551), if it needed the sanction of any court to make it law. This being clean to our minds, we proceeded to acquire title to the O'Fallon road bed in two different ways, with both of which you are familiar: by condemnation on the part of the S. E. R. W. Co., and by sale under a deed of trust to Winslow and Wilson. I need not say that the letter is our chief reliance, and that a contract should be made between W. and W. and the S. E. Co. in regard to the matter, as soon as practicable.

Our point was to place the land holders in a position where they would be prevented from resorting to equity and stopping the S. E. Co. by injunction, they have no claim against that Co. at law, in our opinion, and we had only to fear the Chancellor. We believe that we have succeeded in placing them in that position, and their sole remedy now is upon the O'Fallon Co., which they permitted to enter without a bond and hold itself out to the world as owner.

Only five or six land owners on the route are in a condition to try any conclusion whatever. A majority of them never caused any summons whatever to issue against the O'Fallon Co., when the law requires them to be issued returnable to the next term of the Circuit Court. Of those who did have summons issued, one has taken his judgment to the

105 Supreme Court and had it reversed on account of his own error, but, although almost a year has elapsed since that was done, he does not pay the costs in the Sup. Ct. and bring his case back, having, it appears, lost faith in the business.

You will observe that the responsibility we took was heavy, and that the result is likely to confirm the correctness of our views. Timidity in law is as fatal as it is in any other business, and in dealing with weighty affairs it ought not be indulged in beyond the bounds of reasonable prudence. The management must not permit inexperienced counsel to pass unfavorable criticism upon our work, without understanding it or the legal principles upon which it was done. This business received our

careful study and attention, and all we knew we gave to the Company, to further the object it then had in view. It has not appeared that we made any error of fact or judgment up to date, and that this is the case, I must say, is due more to our luck than anything else; *that*, I believe, did not desert us at any time.

We have a right to expect from the Company an early adjust-
106 ment of our claim for services, which we deem just, and which ought to be settled, and shall look for a reply at your earliest convenience. Very truly yours &c.,

C. W. THOMAS,
for C. W. and E. L. T.

And the plaintiff, by its counsel, objected to the reading of the paper in evidence, because it was proved that the letter was written by Thomas as a lawyer to his client, was a communication of a privileged character, but the Court overruled the said objections and allowed the paper to be read in evidence, and to this decision of the Court the plaintiff, by its counsel, at the time excepted.

The plaintiff then introduced Edward F. Winslow, a witness, who testified as follows, to-wit:

EDWARD F. WINSLOW, the defendant, being duly sworn, testified as follows:

Q. You may state when your connection with the O'Fallon Railway Company first began, and then state to the Court precisely what your relations were to it: covering your transactions as contractor
107 and subsequently as President of the St. Louis and Southeastern Railway Company, when, as contractor, you built, and where as President of the St. Louis and Southeastern Railway Company, you sought to acquire title for the St. Louis and Southeastern Railway Company to the Belleville and O'Fallon Railway.

A. It may be necessary, in order to arrive at what is important in the case, for you to ask some questions immediately pertaining to the matter. I was living at Davenport, Iowa, and received communications from parties in Belleville requesting me to aid in the construction of a road from Belleville to O'Fallon under a charter which had been obtained by certain citizens of Belleville. The Company, I was informed, was organized under the name of the Belleville and O'Fallon Railway Company. I think this was in the year 1869 or 1870, I think. In consequence of those communications and subsequent conversation in behalf of the matter, I went to Belleville several times, and I think,
108 in my individual capacity, entered into a contract to do the grading of the road for a specified sum of money: I don't remember the amount. At this time, or soon afterwards, I had been made a director and chosen President of the St. Louis and Southeastern Railway Company, which Company was authorized to build a road from St. Louis through Belleville to Shawneetown.

I, as an individual, contracted with this Belleville and O'Fallon Railway Company to do its grading, and completed the contract and received the pay for the same with the exception of some small balance. I don't recollect the exact amount. As a contractor for the road, my relations

to that Company ceased with the performance of that duty. I had associated with me in the matter a man by the name of Rice, who really had charge of the work, and who received the pay as my agent, or associate or partner, I don't recollect exactly how the thing was fixed, and he received and disbursed this money and accounted to me for the difference between the cost of the work and the amount paid by the Company, or which I was entitled to receive as contractor. Subsequent to this time, the people of the city and the officers of that Company approached me, after my relations to this road as contractor had ceased, with a view of having the road completed by the construction of the bridging and track. I declined, individually, to have anything
109 further to do with the matter, and subsequent to that time never had any relation to the concern, as an individual, so far as my memory goes, excepting one behalf which will be shown hereafter.

But I think an arrangment was finally made by and with the advice of Mr. Charles W. Thomas, who was then the counsel of the Southeastern Railway Company, for the purpose of completing this line as a branch of that Company's railway, the charter of that Company authorizing it to build branches not exceeding ten miles in length from any point on its line, as might be determined by the Company, and acting under the advice and counsel of Mr. Thomas, who was then, as I say, counsel for the Southeastern Railway Company, all of the proceedings in relation to the Belleville and O'Fallon Railway Company were had.

One process of acquiring this old grade, which at that time had become well settled, &c., was by condemnation. I advised, but Mr. Thomas drew all the papers in relation to such condemnation, acting in accordance with the powers conferred upon the Southeastern Railway Company by its charters and the laws of the State pertaining to the condemnation of property for railway purposes. A condemnation of that grade and all the interest in the lands, as far as could be covered by the process, as I was informed by him, was had, and as I believed at that time, and still do believe, the Southeastern Railway
110 Company acquired title to this right of way and to this grading on this located line. The road was constructed on that grade. The bridging was done, the track was laid, and for the purpose of obtaining money to purchase ties, lay the track, do the bridging and complete the road, I arranged or borrowed the money, as President of the Southeastern Railway Company, of Messrs. George Opdyke & Company of New York.

Q. Permit me to call your attention to that letter, (producing letter) and ask you whether that is a letter written by you to George Opdyke in that behalf?

A. Yes, sir; this is a letter in my hand-writing as President, a communication from me as President of the company, to Messrs. George Opdyke and Company, relating to that loan. That is the original letter. I proceeded as President of this Company to build this branch under our charter. As I was informed and believed, the charter of the O'Fallon Railway Company had a limitation clause, which, if I remember right—I have not read it for a number of years—if I remember right, it required the road to be constructed within a certain number of

years within the time the work was commenced or from the date of the charter or some other fixed period or period to be fixed; and if the company failed to complete its road within that time, the charter lapsed, and of course, as I was informed by our counsel Mr. Thomas, all the powers of the charter lapsed with the charter, and there would be
111 a grade there without title except in the owners of the land perhaps. I think there were two reasons why the people of Belleville were desirous of having the road built: First—because they thought it would be of great advantage to the city: and second—because this limitation of the charter was likely to make void all they had done. And the city, I think, subscribed some fifty thousand dollars of the money in bonds, I believe, with which this work was performed. I had nothing to do with pledging that subscription, it was simply a matter between themselves.

Q. To whom was the subscription—to the Belleville and O'Fallon Railroad Company?

A. Acting in accordance with the arrangements which I had as President of the company, by and with the advice of the Board of Directors, and I think Mr. Thomas at that time was probably a member of the board of the St. Louis and Southeastern Railway Company—I am not certain, but I think he was, he had been—I proceeded to use the money obtained from Messrs. George Opdyke & Company, upon the pledge of bonds which were to be issued upon this O'Fallon Railway Company to him as security, I proceeded to build this branch road for the Southeastern Railway Company, and did build it as such branch as I believed.

Q. Who operated it thereafter?

A. The St. Louis and Southeastern Railway Company proceeded to operate it immediately after it was built, and have, I believe,
112 continued to operate it, either directly or through the Receiver of the road since, and I am informed are now operating it. Soon after, during some of these proceedings, I was advised by Mr. Thomas that certain parties who had lands over which the road was constructed had failed to take the sum of money which had been allowed to them, or for which the land had been appraised by the commissioners under the law, and who were appointed, I think, by the County Court of St. Clair county or the County Judge, for and in behalf of the O'Fallon Railway Company, composed as it was of citizens of Belleville and O'Fallon and other places around there. Mr. Thomas informed me that some of these parties had failed to accept the appraised amount, and had commenced suit against this Belleville and O'Fallon Company for a larger sum, as is sometimes done, and advised that in order to harass and delay these parties and perhaps complicate matters still further with them and eventually to require them to take the appraised value, that the O'Fallon Company should make a trust deed to him as trustee, bringing in either myself, individually, or myself and my partner, General Wilson, under the name of Winslow and Wilson.

Mr HALBERT, of counsel for the plaintiff, inquires of the Court, if conversations between the President of the St. Louis and Southeastern Railway Company and their counsel, Mr. Thomas, is proper testimony

as against the plaintiff in this case: the Court allows it to go in, but may not consider it.

113 *Q.* I desire to caution you to direct your attention, as closely as you can, to the construction and operation of this road, and especially to the question as to whether Winslow and Wilson put any money of their own into the property, or had any personal interest in its construction except as trustees or agents?

A. In answering that question, I would say that so far as I know, Messrs. Winslow & Wilson, neither of them had any interest in this property otherwise than endeavoring to assist the Southeastern Railway Company to acquire and perfect its title in the same under the advice of the counsel of the St. Louis and Southeastern Railway Company, and if any action of theirs was taken about the matter at all, it was with a view to furthering and protecting the interest of the Southeastern Railway Company, in and to the property, and I don't now recollect that we had any further or other interests in the property than that.

As far as I was concerned, I always considered that the branch was a branch of the Southeastern Railway Company, built under its charter authorizing the construction of branches: that the property of the O'Fallon Railroad Company, and their interests connected with it, were condemned under the law for the purpose of acquiring title and vesting it in the Southeastern Railway Company. As soon as the road was done it was operated by that Company which built it or completed it.

114 And I have no recollection of any adverse interests in the matter whatever.

Q. I will ask you whether you have ever, at any time, or whether the firm of Winslow and Wilson has ever, at any time, pretended to have any direct or personal interest in the ownership of this property?

A. I don't know what General Wilson may have done, but so far as the action of the firm is concerned, of my knowledge, we have no interest in it that I know of, nor have we ever had any interest in it. I mean to say, which interests were otherwise than as aiding the Southeastern Railway Company in perfecting its title.

Q. Did you ever claim to have the personal ownership of this property?

A. I don't think I ever did: I don't see how I could. I never believed that I had such ownership, and I don't recollect of ever having made any such claims directly or indirectly.

Q. I will ask you whether you ever had any other connection with the Belleville and O'Fallon Railroad, so far as its transfer to the St. Louis and Southeastern by the instrument which you have heard read than as trustee or agent for the Southeastern Company or for George Opdyke and others, who furnished the money with which to build it?

A. All that I ever did about that matter was perfecting the title in the St. Louis and Southeastern Railway Company as far as I could.

Q. Now, explain to the Court how it come that the deed of

115 trust to Charles W. Thomas was made, and the deed from Thomas to Winslow and Wilson?

A. The occurrence was some time back, and I will have to think a moment. I know this, that all which was done in that behalf, or in that

connection in any way, was not done at my own suggestion, further than possibly I might have, in consultation with our counsel, Mr. Thomas, asked if anything were needed to perfect the title in the Southeastern Railway Company. As near as I can recollect, he advised us to proceed and obtain some kind of an arrangement or interest in furtherance of that idea with a view of ultimately preventing the parties whose right of way had been condemned, and who had refused to receive the award of the commissioners, preventing their getting any higher price, and in accordance with that arrangement I think Mr. Thomas suggested that the Company should issue some bonds, some two or three or so, in the sum of thirty thousand dollars, perhaps in payment or for some reason connected with my original position as contractor for a sum due me, and that the road should be sold out under that and bought by him as trustee—sold by him as trustee and purchased in the name of Winslow and Wilson—I think that was the way of it—with a view of complicating this right-of-way question, and as I understood no other cause. The only reason that I assented to that was this: I believed the parties who owned the right-of-way who were endeavoring to secure higher
116 price for it than was awarded by their own fellow citizens, acting under the appointment of the Court in their own county. I believed the award was sufficient, and in carrying out my views in that direction, I was willing to assist, so far as I could officially, in that idea.

Q. What connection, if any, to your knowledge, did Charles W. Thomas have with the Peoples Bank of Belleville during that time?

A. I don't know that he had any: I don't know that the Bank at that time was organized. I don't know how that was.

Q. At a later day, what connection did he have?

A. I was informed, at some later time, that he was a director in that bank. But I have no evidence of that fact.

Q. Now, state with reference to the delay in the execution of the conveyance from Winslow and Wilson to George Opdyke and Company, and from Winslow and Wilson to the St. Louis and Southeastern Company?

A. I don't know as I know why the delay occurred except from the fact that I wasn't advised by counsel that it was essential or should be made until a later day. In all matters of that kind I acted under the advice of our counsel.

Q. With regard to this deed from Winslow and Wilson to the St. Louis and Southeastern Railway Company consolidated, purporting to have been made on the fifth day of January, 1876, I will ask
117 you if your connection with the St. Louis and Southeastern Railway Company continued down to the time of the execution of this instruments?

A. I think I was a director at that time, but had no other connection with it.

Q. Where were you at the time of the execution of this instrument?

A. I was at Cedar Rapids, Iowa.

Q. Do you know where General Wilson lived at that time?

A. My impression is that he lived in Wilmington, Delaware.

Q. You and your wife resided in Iowa, and General Wilson and his wife resided in Delaware?

A. Yes, sir.

Q. Now, I will ask you what was the reason of the delay in recording this instrument. Did you use proper and due diligence on your part in having it recorded?

A. Yes, sir; as far as I was concerned, I did. It was not acknowledged before a Notary as early as might have been, by a little while, in Iowa, on account of the serious illness of my wife who was unable to sign. But as soon as she was able, I had the Notary take the acknowledgment, and she executed it, and I returned it as soon as I got that done.

Q. Look at those notes, (the notes sued on) and state whether the writing on the back, endorsing the firm of Winslow and Wilson, is yours?

A. Yes, sir.

Q. State whether you have any recollection as to the circumstances covering the execution of those notes, and especially as to the conversations that passed between you and the Peoples Bank, or
118 their representatives, with reference to the loan and the collateral?

(Notes dated December first, 1873.).

A. These notes, if I recollect right, I have not looked up the case properly, are renewals of the other papers given to the same bank which had matured along about this time or before, and for a like amount I think. At the time those notes were made Mr. Alexander was Treasurer of the Company, and he and I, or one of us—I think he did, and I think both of us did—saw the President of the Peoples Bank.

Q. Who was the President of the Peoples Bank?

A. I think Judge Pieper, and requested an extension of time on this loan, as the Company was unable to pay and as Winslow and Wilson were equally unable to pay, and I think there was attached to those notes some of the first consolidated bonds of the Southeastern Railway Company as security.

Q. There is nothing to indicate on the face of the notes?

A. The Company were not in the habit always of having that specified on the face.

Q. It is your impression that there was collateral?

A. Yes, sir.

(It is admitted by plaintiff's counsel that there was eighty thousand dollars face value of consolidated bonds attached to the notes of December first, 1873.)

Q. State whether at the time this original loan was perfected
119 between the St. Louis and Southeastern Railway Company consolidated, and the Peoples Bank, any representations were made by you or authorized to be made by you to the officers of this bank with reference to the ownership of this O'Fallon Branch Railroad?

A. I don't see how any should have been made which controvert in any way the testimony which I have given. I, at this time looking back, do not recollect of having had conversations with the officers of the

bank about that loan in person, although I presume I did. These loans were some of the great many made by the Company.

Q. I will ask you the general question, whether at that time, or before or after, when you endorsed notes, if you were asked any questions with reference to your condition as to solvency, if you ever claimed any interest in the O'Fallon Branch property?

A. I never recollect of doing any such thing.

Q. I will ask you whether in signing these particular notes, with reference to the sufficiency of your guaranty or endorsement, you took into consideration or if you knew whether the other parties took into consideration any interest which you have been supposed to have in the O'Fallon Branch?

A. I didn't take into consideration that fact at any time: I don't see how anybody else could have done so.

Q. I will ask you now the general question, whether in all the proceedings with reference first to the condemnation of the O'Fallon
120 Branch in the interest of the St. Louis and Southeastern, next as to the trust deed from the O'Fallon Branch to Thomas and from Thomas to you and from you to Opdyke, and to the Company, you were not in point of fact, acting under the advice of Charles W. Thomas with sole reference to perfecting the title of the Southeastern Railway Company to this property?

THE COURT.—The witness can answer whether Mr. Thomas was the recognized attorney.

A. In all matters pertaining to the acquiring of the Belleville and O'Fallon Road as a branch of the Southeastern Railway, I acted under and relied upon the advice of the counsel of the Company: for the time being Mr. C. W. Thomas, who was paid by the Southeastern Co. as such attorney, and I think such bonds were deposited as collateral with this paper.

Q. I will ask you, at the time this loan was made the St. Louis and Southeastern Railway Company consolidated, was in the open and well-known possession and operation of the O'Fallon Branch Railroad?

A. Yes, sir.

Q. Has it been since either by the acts of the Company, or otherwise?

A. Yes, sir.

Cross-Examination.

Q. Will you state to the Court who were the contractors that buil the St. Louis and Southeastern Railway? t

A. You mean to say the men who did the grading?

Q. No sir, the contractors who took the contract to build it.
121 A. I think the railway in Illinois was built under the immediate supervision of the Company.

Q. Who were the contractors under the Company?

A. There were quite a number: I don't know, probably fifty or one hundred.

Q. Were Winslow and Wilson contractors?

A. In one sense, they had an interest in the construction of the

road, for advancing its interest in aiding in the negotiation of its bonds they were paid a price or commission in the capital stock of the Company.

Q. I ask you whether you had any written contract with the Company, as its contractors, to build its railroad and turn it over to them in the State of Illinois?

A. I think there is no such contract existing.

Q. Was there any contract whatever between Winslow and Wilson and the St. Louis and Southeastern Railway Company?

A. Yes, sir; there was one in the nature of the one that I have just described, which is a matter of record in the Company's books.

Q. Did it have anything to do with grading the road?

A. No, not except it may have related to the fact that we were to supervise the construction of the Railroad.

Q. Did it have anything to do with procuring iron and ties and laying them upon the road and making purchases?

A. I don't think it recites any of these things.

Q. You don't think Winslow and Wilson had anything to do with that?

122 A. They bore a relation which may be in the nature of a contractor or financial agent, or some such relation, whichever way it may be construed in law: I don't know.

Q. State to the Court succinctly, whether Winslow and Wilson had any contract with the St. Louis and Southeastern Railway Company in which Winslow and Wilson were to build the railroad or any portion of it?

A. I am inclined to answer that question categorically and succinctly except so far as I have stated.

Q. You don't remember that there was any contract by which you and Wilson, as contractors, undertook to build and transfer to the Company the road for bonds or capital stock?

A. I think there is no such contract. There is a contract of the indefinite or general nature that I have stated.

Q. You say the only contract that Winslow and Wilson ever had with the Company was in regard to its finances in negotiating its bonds and collecting its money?

A. The Southeastern Company, as now constituted, or was when I was connected with it, was made up of a conglomeration or consolidation of quite a number of Companies, and Winslow and Wilson did have a contract with some of the Companies.

Q. I didn't say anything about the St. Louis and Southeastern Railway Company consolidated, I said the Southeastern Railroad Company. State whether you ever had any contract with the St.

123 Louis & Southeastern Railroad Company?

A. I had the contract in the manner that I have attempted, in a weak manner, to describe.

Q. And that is all?

A. That is all I recollect.

Q. You never had any contract to furnish the ties and iron, and do the bridging for the St. Louis and Southeastern Railway Company?

A. Except, under that general resolution spread upon the records of the Company, for which we received capital stock, if I recollect right.

Q. Were you to receive any bonds?

A. I think the contract, if you call it that, does not relate to any bonds or moneys.

Q. Did you, individually, ever have any contract to build grade, furnish ties or iron for any portion of the St. Louis and Southeastern Railroad?

A. The old Company?

Q. Yes, sir.

A. I don't think I ever did.

Q. Did you have any contract with the St. Louis and Southeastern Railroad Company to build the O'Fallon Branch?

A. I did not.

Q. Did you have any contract with the St. Louis and Southeastern Railroad Company to put any iron, or furnish or equip the O'Fallon Branch?

A. Not that I ever recollect of.

124 Q. Did the St. Louis and Southeastern Company, in its dealings, borrow this money directly, or did you borrow it for it?

A. Well, sometimes we borrowed for the Company as financial agents; sometimes the President or Treasurer, or both, borrowed it for and in behalf of the Company directly. We borrowed a very large amount at those times.

Q. I am afraid that your memory is not very clear. I want to ask whether you ever had any contract to build, we will say, the road from McLeansboro to the State line, going East—the old Evansville and Southern Illinois Railroad, now part of this consolidated line—did you ever have a contract to build that?

A. Messrs. Winslow and Wilson were the contractors for building that.

Q. State to the Court, who furnished the iron for the Southeastern Railroad Company that was put upon the O'Fallon Branch?

A. You mean the mill?

Q. No, sir, I mean the person who furnished it to them: that is, the last persons who furnished it and became responsible?

A. Do you wish me to explain directly how that iron got there?

Q. Explain where it came from, who furnished it and how the money was raised.

A. I, as President of the Southeastern Company, purchased
125 of the Marietta Iron Works, as near as my recollection serves me, a certain quantity of iron rails, of what is known as the fish bar pattern, for and in behalf of that Company, and we laid that iron upon the road between Ashley and Mount Vernon, and took up certain iron rails there laid and transported them down to Belleville and relaid that older iron, which had been in use, upon the O'Fallon Branch, and is there now as far as I know.

Q. Whom was that iron billed to that you put on the road between Ashley and Mount Vernon?

A. The Southeastern Railway Company, or to the President or Superintendent, as is customary and usual.

Q. That is where the iron came from?

A. Yes, sir.

Q. When did you go into partnership with General Wilson?

A. I don't recollect exactly: perhaps about 1871.

Q. Do you remember the time of year?

A. I do not.

Q. Will you state again? I didn't exactly understand your idea of how those eighty thousand dollars of bonds came to be issued on the O'Fallon road by the O'Fallon Company?

A. My memory in that matter is a little indistinct, I think you could explain that much better than I could.

Q. Then all the knowledge that Mr. Thomas got in that
126 matter he procured as counsel for the Southeastern Railway Company, did he, or did he not?

A. I should think he did.

Q. We understood you to state that the O'Fallon Railroad Company, according to your understanding, conveyed the title of this road to Mr. Thomas, as trustee, in order to defeat the claims of certain land owners for right-of-way?

A. I think that is what it was done for.

Q. Did you know at that time that that was the purpose for which it was done?

A. I think I was advised by our counsel, Mr. Thomas, that that was the object.

Q. You were President of the St. Louis and Southeastern Railroad Company at that time?

A. I was.

Q. Were you cognizant of the fact, if it is a fact, that in the fall of 1875, a proposition was made under the direction of the St. Louis and Southeastern Railway Company, in the Directors' meeting, to lease this O'Fallon Branch from you and General Wilson?

A. I think something was said about that.

Q. How came such a proposition to be made, if as you say, you had no interest in it?

A. As near as my memory serves me, after some time had elapsed following the time of Mr. Thomas, as counsel for the Company, Mr. Hamill's attention was directed to this Company's title to the
127 O'Fallon Road, and he was requested if anything further was needed to prepare any papers necessary to still further perfect the title, and I think, as such counsel, he did prepare a lease. I never paid much attention to it. I don't know that I ever read it over, except in a cursory way, I looked it over in a cursory way and I don't think any such lease was ever consummated. But if it was, it was with the sole view of still further, if it could be, perfecting the title of the Company to that property, because Mr. Hamill had advised us.

Q. We don't care anything about Mr. Hamill's advice. Who made the proposition to the board, if you know, to lease the road from you and General Wilson?

A. I don't recollect who, unless Mr. Alexander may have done it. I wasn't present at the meeting.

Q. Did you have any conversation with Mr. Alexander beforehand in order to induce him to do it?

A. Yes, sir, I think I did.

Q. It was then done at your instance?

A. It was. I was advised by Mr. Hamill to have it done.

Re-examination.

Q. In response to inquiries of counsel on the other side, you stated that your connection with the St. Louis and Southeastern Railroad Company, originally, was that of fiscal agents. In that line, I desire
128 to ask of you whether you had, or your Company had, frequent dealings with the Peoples Bank of Belleville; whether other loans anterior to this and other transactions anterior to this, were had between the St. Louis and Southeastern Railroad Company and yourself and that Bank?

A. I don't now recollect of any.

Q. You stated, in the examination in chief, that this note was probably a renewal. I will ask you now what is your best recollection on that point?

A. Well, if my memory serves me correctly, the original loan was in two or three or more parts, amounting in the aggregate to about forty thousand dollars, and obtained some three months before the date of these notes.

Q. And these notes were renewals of that loan?

A. Yes, sir.

Q. I will ask you if you know, and if so state, whether your relation to the Company of fiscal agents was generally known along the line of the St. Louis and Southeastern Railway?

A. I should think it was.

Q. Did you ever hold yourself out to the public, or did your firm ever hold yourselves out to the public, as having any other relation to the St. Louis and Southeastern Railway Company other than was
129 evidenced by the fact that you were President and the relation you have just indicated?

A. Not that I recollect of.

Q. I will ask you if you know, and if you do, you may state whether it was not well known to the officers of the Peoples Bank, the fact of the capacity in which you were acting, and your relations to the St. Louis and Southeastern Railway Company.

A. I should think it was: I don't see why it shouldn't have been.

Q. I will ask you if your dealings were quite extensive in Belleville?

A. I have had a great deal to do, as the President of the Company, in Belleville.

Q. In response to the question propounded by Mr. Thomas, as to the object of this trust deed to Mr. Thomas, he asked you if it was not to defeat the matter of compensation to the real estate holders, along the right-of-way. Let me recall your attention to your testimony in chief,

and ask you if that was not upon the basis of your original examination, that the parties had already been compensated?

A. Yes, sir, they were, or would have been if they had taken the award.

Q. It was not your purpose to take the property without compensation?

A. No, sir, not at all.

Q. With reference to this matter of lease that has been called
130 out by Mr. Thomas, you may state to the Court whether in your relation to it, if it should turn out by subsequent testimony that you were to have direct connection with its inception, you had any other object in view than that which you have already stated in reference to the trust deed executed?

A. No, sir, only to further secure the title of the property to the Company.

Q. To prevent the land holders from getting excessive compensation?

A. Yes, sir, that may have had something to do with it. It was to carry out the idea of securing the title.

Q. The idea that was suggested by Mr. Thomas?

A. Yes, sir.

Q. I will ask you whether or not, from the first inception of the trust deed from the Belleville and O'Fallon Branch to Thomas, and from Thomas to you, it was not the full intention of the firm of Winslow and Wilson to make a transfer of the title to the St. Louis and Southeastern Railway Company?

A. Oh, certainly, we intended to convey any interest we had.

Q. You never had any interest in it different from that you have stated?

A. No.

Q. Now, if you have any other statement which you wish to make you can do so.

131 A. I wish to make, to your Honor, this personal remark: that I regret the circumstances of this loan, inasmuch as it has turned out badly. But as a further proposition and excuse, I will say that at the time the loan was made first, those bonds could have been sold in New York at a higher price than they were pledged at; consequently I thought the loan was safe, and as President of the Company made it with that idea. They might not have been sold at a price which we thought they were worth at that time, but they could have been sold for a higher price than the sum for which they were placed. I refer to the bonds that were collateral to the paper. That is the reason that Winslow and Wilson felt safe in endorsing the paper, and the reason why I thought the bank was safe in making the loan, and why I advised that and other loans to be made. I had sold a million or more of them at a very much higher price at, or before or about that time.

Q. I will ask you in that connection, if you don't know as a matter of fact, that the bank accepted the collateral as a full and sufficient security, or as an adequate security, for more than they did the name of Winslow and Wilson?

A. I should think so. I don't know how valuable they considered our name, but that is the way I looked at it.

Q. I will ask you whether at that time you were largely engaged in negotiating similar loans where the interest of the Company required it?

132 A. I was.

Q. I will ask you whether it was your rule to deposit as collateral consolidated mortgage bonds?

A. It was the rule.

Q. State whether or not it was considered by you that the consolidated mortgage bonds were a full and ample security for the loans effected by you at that time?

A. They were so considered.

Q. State whether their pledge upon the market, as you understood, or those who dealt with them, was considered as an adequate security for loans made on them?

A. Loans were made on them at a much higher rate.

Q. State whether you know, and if you do, you may state whether the Peoples Bank made the loan on the strength of that collateral?

A. I think they did.

Q. There is one thing I neglected to ask you. It is this: Do you remember whether the parties that owned the land along the O'Fallon Railroad had appealed from the award of the commissioners at the time this deed of trust was made?

A. I don't recollect.

Q. Do you remember whether they were proceeding at the time this deed of trust was made, in the Circuit Court?

133 A. I know some proceedings were pending. I don't exactly recollect what the condition was at that time. It occurs to me that possibly the first proceedings in the Court above, the one which appointed the commissioners, had demurred to, or demurred at, or dismissed, or something, and another one about to be, or thought to be about to be instituted, something of that kind; I don't recollect the condition all around.

Q. And the object was to prevent the land owners from—

A. It was one of the main objects.

Q. In connection with the title, ownership and possession of the St. Louis and Southeastern Railway, as to the Belleville and O'Fallon Branch, you may state to the Court upon which of these lines of deeds you, as the President of the Company, relied for the title to that road?

A. You mean how I regarded them?

Q. Yes, sir.

A Not being a lawyer, I was not so well informed on it as some other people. I thought the process of condemnation was the most reliable, and I rested upon it.

Q. Were you so advised?

A. Well, I was so advised by several people; yes, sir.

Q. Were you advised by counsel at that time, that that gave you a substantial title to the property?

A. I think Mr. Thomas so advised me.

Q. I wish you would look at that instrument, and state what it is.

A. It is a first consolidated mortgage bond of the Southeastern Company.

Q. State whether this is the character of the bonds that

134 were deposited as collateral with the Peoples Bank?

A. Yes, sir, I believe it was; it may have been different in amount.

Q. It was of this series?

A. Yes, sir.

Q. State at what rate you were borrowing money on these bonds, at the time the forty thousand dollars was borrowed from the Peoples Bank of Belleville; at what rate as collateral were these bonds usually deposited in the East?

A. From sixty to seventy-five cents.

Q. State what value at that time the Company placed upon them.

A. We placed value on them of eighty to eighty-five cents.

Q. State whether the Company, at that time, was actively engaged in negotiating the bonds.

A. They were, both in this country and in Europe. Nearly a million were subscribed for.

Q. Who was in Europe representing the Company?

A. Mr. Wilson.

Q. What was this money borrowed for?

A. It was borrowed for the general use of the Company.

Q. Wasn't it borrowed to pay interest on the first debt?

A. No, sir, I believe not: I can't say at this time, but, as a matter of fact, we didn't pay any interest after this loan was made. The panic intervened.

Q. Before the payment fell due?

A. Yes, sir.

135 Q. Wasn't it borrowed for the purpose of paying interest on the first bonds, so as to help the sale of the second?

A. At this distance of time, I should say it was not.

Q. Don't you remember that no bonds were put up as collateral to the first notes?

A. Yes, sir, from what Judge Pieper says, I presume that is correct: it was put up when the second loan was made, I believe: I wasn't present when the first loan was made.

Q. I will ask you, if at that time, you had not incurred very heavy liabilities in connection with the purchase of the road in Kentucky and Tennessee?

A. Yes, sir.

Q. How much did the Company pay?

A. I think in round numbers, they paid one party sixty or seventy thousand dollars.

NEW YORK, April 1, 1872.

Messrs. George Opdyke & Co,

Financial Agents, St. L. & S. E. R. W. Co.

Dear Sir: Upon such advances as may be by you made for con-

struction and equipment of the O'Fallon Branch of this Company's railway, we will place with you, as collatteral security and for sale on that account, the first mortgage bonds to be issued upon the branch to
136 be built. You are authorized to sell the said bonds at such price as will, in your judgment, best serve the interests of this Company. Yours very truly,

E. F. WINSLOW, *President.*

The interpleaders then introduced one Frederick H. Pieper, who being duly sworn, testified as follows:

Testimony of F. H. Pieper.

F. H. PIEPER, called for the interpleaders, being duly sworn, testified as follows:

Q. Are you the Judge Pieper that is referred to in these condemnation proceedings, that were read in this case this morning?

A. I did not hear them read.

Q. Were you County Judge of St. Clair County in 1871?

A. Yes, sir, I was.

Q. I will read from part of the testimony that was introduced here: "We, the undersigned commissioners, appointed by the Honorable Frederick H. Pieper," &c., that was yourself?

A. Yes, sir.

Q. Do you have any personal recollection, aside from the records of the county, in regord to that transaction?

A. No, sir.

Q. State when the Peoples Bank of Belleville was organized?

A. In '68, I think: the summer of '69.

Q. State what your connection with the Peoples Bank of Belleville was in 1871?

A. I was its President.

137 Q. Have you continued in the excercise of the duties of the position up to the present time?

A. Up to last January, 1877.

Q. You may state whether Charles W. Thomas was connected officially with the bank.

A. From its organization?

Q. Yes, sir.

A. I think he was a Director.

Q. Is he a Director now?

A. No, sir, I think not.

Q. When did his connection with the bank, as Director, terminate?

A. I couldn't state.

Q. About when?

A. I don't remember whether it was before—

Q. Was it about January, this year?

A. Somewhere about that time: I am not positive as to the exact time.

Q. State whether Mr. Thomas, in addition to being a Director in the bank, also acted as its counsel at any time?

A. I think not during the whole time. He might have done it in some special cases. He wasn't the attorney of the bank. He was called sometimes to attend to cases, and assist the regular attorney, perhaps.

Q. You may state whether he was the attorney in the cause of the Peoples Bank against the St. Louis and Southeastern Railway
138 Company, for forty thousand dollars.

A. I presume he is. Mr. Noetling, the attorney of the bank, said he desired assistance in the matter, and I told him there was no objection to it. He asked if there was any objection to having Mr. Thomas, and told him that I thought it was proper that he should be the other attorney, as he was a Director of the bank.

Q. About how often has Mr. Thomas acted as the counsel of the bank?

A. In a number of cases: I wouldn't state the number.

Q. Who was the regular attorney of the bank?

A. Mr. Noetling.

Q. When did Mr. Noetling commence to be attorney?

A. From its organization.

Q. And is yet?

A. Yes, sir.

Q. Was Mr. Noetling interested with Mr. Thomas in the proceeding for the collection aud enforcement of the forty thousand dollar note?

A. It was handed to Mr. Noetling, for collection, in my presence.

Q. As far as the legal proceedings were concerned, you committed them entirely to Mr. Thomas?

A. The bank committed them to Mr. Noetling, and Mr. Noetling asked if there was any objection to Mr. Thomas being asked to assist.

Q. State what you know about this forty thousand dollar loan
139 by the Peoples Bank, to the St. Louis and Southeastern Railway Company, when it was first made, and as to the renewals, and as to the circumstances attending its making and renewal?

A. I don't remember the dates: I take it from the book. The first loan was made on or about the second day of August, 1873. Mr. Alexsnder came to me—he was the Treasurer of the St. Louis and Southeastern Railway Company—and asked me if we had any surplus money in the bank. I told him we had. He said he desired to borrow twenty thousand dollars. I told him that I didn't think we could accommodate him. He said he had a piece of paper which was perfectly good, and he would like to negotiate it with the bank. I hesitated, and told him I didn't think there was any use to do so. I think that was in the forenoon of that day, between the hours of eight and nine o'clock, I think about the second day of August, 1873. With that I left him. That was on the street. And some time in the forenoon, I was in the back part of the bank, and he and Mr. Thomas came in together. The discount board was in session and he presented his paper again. It was guaranteed on the back of it by Messrs. Winslow and Wilson, J. F. Alexander, J. B. Hunter and William S. Smith, Junior. It was dated the second day of August, 1873, payable to E. F. Winslow, President, and made out in the name of the Company and payable to him.

140 Q. In other words, it was the same character of paper upon which suit has been brought?

A. Yes, sir, payable in four months from the date. The discount board apparently hesitated at first, and Mr. Thomas and Mr. Alexander came to me where I was standing. Mr. Thomas came in, and said he, "Boys, this paper is perfectly good. Mr. Winslow owns real estate in this county, and he owns the O'Fallon Railroad, and it is perfectly good." I hesitated, myself. I didn't want to interfere, and withdrew from where Mr. Alexander was standing, and the discount board took the paper. There was no bonds offered or hypothecated at that time.

Q. When were the bonds hypothecated?

A. There was another loan.

Q. State about the renewals.

A. I will explain about the other two loans if you have no objection. On the thirtieth of August, Mr. Winslow and Mr. Alexander both came over, and they had paper that was guaranteed on the back of it by Winslow and Wilson and Alexander, and with that they offered to hypothecate bonds, ten thousand dollars. And then again, on the first of September, they obtained ten thousand more upon the same kind of paper, with collateral and bonds. When this paper came due—the first twenty thousand dollars—it came due on December eighth, I think, some four months from its date, Mr. Winslow and Mr. Alexander,

141 both came over and wanted to extend the paper; said they couldn't meet it. Then this question in reference to hypothecating came up, and they hypothecated these consolidated bonds at the rate of fifty per cent. For the twenty thousand dollars they hypothecated forty thousand dollars in bonds.

Q. When was that?

A. Some time in December. I can't tell whether it was directly before they became due, or whether it was shortly afterwards. That is the paper which is now in court.

Q. You can look at that and state whether that is the collateral or character of the collateral referred to.

A. I merely examined the figures as to the amounts, but I didn't examine it closely. They were put in a package—two or three packages—they were left wrapped up.

Q. You know what they were, don't you?

A. Consolidated bonds.

Q. Where are these bonds now?

A. They were sold.

Q. When were they sold?

A. I couldn't give you the date.

Q. About when?

A. Mr. Noetling sold them: I don't remember the date.

Q. It was subsequent to this petition, asking leave of Court to sell them, I suppose?

A. I wasn't aware of the petition being filed, and couldn't give you the date.

142 Q. Was it last January?

A. I couldn't tell you: it was after the note became due, I remember that.

Q. Was it in January, '76?

A. Possibly it was in January, '76. It was immediately after the notes became due. I remember seeing the notice being written out to the Company.

Q. You may state where those bonds are now, if you know?

A. I couldn't state.

Q. Who was the purchaser?

A. I was the purchaser.

Q. In your own interest, or in what capacity?

A. For the bank.

Q. For the Peoples Bank of Belleville?

A. Yes, sir.

Q. I will ask you whether you ever sent those bonds forward to the re-organizing committee of consolidated bondholders?

A. No, sir.

Q. I will ask you if you had knowledge of the fact that the consolidated mortgage of the Southeastern Railway, securing your bonds, has been put in process of foreclosure in this Court?

A. No, sir, except what Mr. Hamill told me, I think yesterday or to-day.

143 Q. I will ask you if, as a citizen of Belleville, you did not know that J. F. Alexander was the receiver of the St. Louis and Southeastern Railway?

A. I have seen some script with his name on it.

Q. I will ask you if it was not an open and notorious fact, well known to all the citizens of Belleville, that the road was in the hands of a receiver under the foreclosure proceeding of the consolidated mortgage?

A. I couldn't state upon what authority. I know he was receiver, but whether it was under the first or the consolidated mortgage, I couldn't state.

Q. I will ask you whether you had knowledge of the fact that the O'Fallon Branch was in the possession of the St. Louis and Southeastern Railway, from the time or shortly after the condemnation proceedings referred to herein?

A. I couldn't state that, because I never passed over the road but once, and that was at night. I don't think I ever saw a train pass over it, but of course from hearing—I have heard persons talk about it—but I never, to my knowledge, saw a train pass over it.

144 Q. State what you know about the matter in a general way, as to the possession of the road.

A. I couldn't state under oath who was in possession, of my own knowledge.

Q. I ask you what the open and notorious fact, with reference to the possession of the O'Fallon Branch Railroad was?

A. I know nothing further except they would say that the Belleville and O'Fallon train was in.

Q. Don't you know that the Belleville and O'Fallon Road was not operated as such from shortly after the time that you condemned the property, or of the condemnation proceedings?

A. I must say, I have very little knowledge of what was in those papers, except that the petition was read, and of course I paid attention to what was in it; but as to how far it went or what was in it, I couldn't state now.

Q. Didn't you have notice of the fact that this consolidated mortgage that you took was secured in part by the deed covering the O'Fallon Branch property?

A. No, sir. I never looked at the mortgage until after this note became due in the bank. When it came due, or perhaps after
145 that, and then I only read it casually.

Q. What was the result of that examination: did you make any inquiry to ascertain what was covered by your bonds?

A. No, sir.

Q. Or what value they were?

A. No, sir, except I inquired about the value of the bonds, and I found they were not worth anything.

Q. Of whom did you make that inquiry about the value of the bonds?

A. I made it at St. Louis.

Q. Well, did you consult Mr. Thomas upon the question at any time?

A. About the value of the bonds?

Q. Yes, as director of the bank.

A. No, sir.

Q. Did you have any consultation with Mr. Thomas with reference to the sale of the bonds at the time, or before you acquired title to them?

A. No, sir, I didn't that I remember of.

Q. How does it come that you were the purchaser of them if they were of no value?

A. Well, there was no bidder there except myself; I was the only bidder.

Q. Why did you bid on them if they were of no value?

146 A. Well, I don't know why; I bid on them like I would on any other property—took my chances.

Q. Where did you leave the bonds after you purchased them—when did you last see them or hear of them?

A. That was some time shortly after I had given them to Mr. Thomas. Sold them, or he sold them to somebody—I don't know how that was.

Q. You did sell them to Mr. Thomas?

A. Yes, sir.

Q. When was that sale?

A. Some time after this first purchase.

Q. It may be a matter of some importance to us to know just when the transfer was made from the Company to the bank by the sale, and when you transferred them to Mr. Thomas and what the consideration was?

A. I think it was one hundred and sixty dollars I paid for them, and he said he would give me two hundred dollars, and I took them over to him.

Q. Mr. Thomas took them however, at two hundred dollars?

A. Two hundred dollars.

147 Q. Do you know whether he has got them yet or not?

A. I do not.

Q. When was that—was it before this attachment?

A. It was a week after the sale. Oh, yes, before the attachment; a long time before the attachment.

Q. Both transfers, the transfer to the bank and by you, as President of the bank, to Mr. Thomas, were made before the attachment?

A. Yes, sir.

Cross-examination.

Q. You say, that at the time this loan was effected, Mr. Alexander and Mr. Thomas came in and Mr. Thomas stated, in the presence of Mr. Alexander, that Alexander and Winslow and Wilson were solvent, that they owned the O'Fallon Railroad?

A. Yes, sir, and had other lands.

Q. Was credit given on that statement?

A. Yes, sir.

Q. What did Alexander say?

A. He said nothing to the contrary.

Q. Did he acquiesce in it or dispute it.

A. He said nothing to the contrary.

Q. Did Mr. Alexander say anything to you about going out to get Mr. Thomas to come in and recommend that loan to the bank?

148 A. Yes, sir, I met him on the street and told him that I wasn't in favor of making that loan, and he asked me, I think, whether you (Mr. Thomas) was connected with the bank. I was surprised at the time, because I knew you were not attorney of the Southeastern Company. He went and brought you and you made this expression that I have just stated.

Re-examination.

Q. Do you have any recollection that Mr. Thomas had any further connection with the loan than what you have stated?

A. He might have had, but I don't remember now.

Q. What is your recollection of it, especially of the renewal and taking of these consolidated bonds as collateral?

A. I can't state. I don't remember.

Q. I will ask you whether, at the several times of taking these eighty thousand dollars, you took them without any inquiry as to their value?

A. I never made any inquiry before, because there was no time given to inquire. I made inquiries afterwards.

Q. Of whom did you inquire?

149 A. I never inquired until after these first notes came due.

Q. Of whom did you inquire?

A. I inquired of a banker in St. Louis.

Q. You can't recall that you had any further conversation with Mr. Thomas except the one referred to about these bonds?

A. No, sir, I don't think the matter was referred to.

Q. Except at the time of the sale?

A. Yes, sir.

Q. Of course, when you sold him the bonds—

A. At the day of the sale, Mr. Thomas said he wanted to buy those bonds. He wasn't present at the sale and I bought them for the bank. He was absent. I think he was perhaps called off somewhere. I don't think there was anybody present except Mr. Hamill, if my recollection serves me right. I think Mr. Hamill was present at the sale. I think there was only three of us that were present. They were sold in front of the Court House door. Mr. Thomas told me early in the morning that he wished to buy those bonds, and I couldn't find him and I bought them and afterwards sold them to him.

Q. In what capacity was Mr. Hamill acting at the time of the sale?

150 A. Attorney for the Southeastern Road.

(Mr. Wilson, attorney for interpleaders, withdraws his proposition to submit the letter of Mr. Thomas.)

The interpleaders rest.

(Plaintiff's counsel offer in evidence certificate of levy and the record showing its date.)

And here the interpleaders rested.

And now the plaintiff, by its counsel, moved the Court for judgment against the said interpleaders, upon the said issue whether said property so levied on by the writ of attachment was the property of said Winslow and Wilson and subject to said attachment, but the Court denied the motion, and to this ruling and decision of the Court plaintiff, by its counsel, at the time excepted.

And now the plaintiff, to maintain said issue on its part, read
151 in evidence the certificate of levy in the record from St. Clair Circuit Court and introduced as a witness one Charles W. Thomas, who being duly sworn, testified as follows, to-wit:

Testimony of C. W. Thomas.

CH. W. THOMAS, called for the plaintiff, being duly sworn, testified as follows:

Q. Mr. Wilson, in his testimony, has made some statements in reference to the part that you was supposed to have taken in reference to a certain deed of trust and a sale and conveyance made by you, as trustee, to Winslow and Wilson. Please explain that transaction to the Court as you understood it.

A. I don't know how General Wilson and Mr. Winslow understood it. That deed of trust was made in pursuance of a resolution of the

Board of Directors of the O'Fallon Railroad Company, passed at a meeting at which General Winslow were present.

This is a copy of the resolution:

Whereas, the firm of Winslow and Wilson, of New York, have made their proposition in writing to this Company to build and complete the O'Fallon Railroad, upon the consideration that this Company will
152 issue its first mortgage bonds to the amount of eighty thousand dollars, in sums of $10,000 each, payable at Belleville, Illinois, with interest at the rate of 8 per cent. per annum, to Edward L. Thomas, or bearer, and will secure the payment of said bonds and the interest thereon according to their tenor and effect, by giving a first mortgage or deed of trust to Charles W. Thomas, as trustee, on all the franchises and property of said Company. And, whereas, the charter of this Company will expire on the first day of May, A. D. 1872, and immediate action is necessary if the railroad is ever to be built.

Therefore be it resolved by the Board of Directors of said Company, that the President and Secretary make and execute, at an early a date as possible, eight bonds of the Company numbered consecutively, sealed with its seal and payable to Edward L. Thomas, or bearer, on the twentieth day of June, A. D. 1871, at the City of Belleville, County of St. Clair and State of Illinois, each bond to be in the sum of $10,000 and to bear interest at the rate of eight per centum per annum from the date thereof: and that the President of this Company be directed, and he is directed in order to secure the payment of said bonds according to their tenor and effect, equally and ratably, to execute and deliver to
153 Charles W. Thomas, as trustee, a deed of trust upon all the franchises and property, both real and personal, of this Company, said deed of trust to be a first lien upon all said franchises and property of said Company now held or hereafter to be acquired and to be in form and substance as follows, to-wit:

(Here set out trust deed.)

And the President is directed to affix to said deed the seal common and corporate of this Company, and acknowledge the execution of the same according to law.

That resolution was passed. The proposition was to iron the O'Fallon Railroad from Belleville to O'Fallon—a proposition coming from Winslow and Wilson—and the Belleville and O'Fallon Railroad Company would give them the road bed. The object was to pass the title of the road bed in consideration of furnishing the iron.

Q. Who furnished the iron?

A. Winslow and Wilson furnished the iron in pursuance of this proposition they made to the Company, and this Company paid them for it in these eighty thousand dollars bonds: in other words give
154 them the road as it was then for putting the iron on it. That was the purpose of the whole arrangement.

Q. Was this deed of trust given to secure Winslow and Wilson for ironing this road?

A. It was made to secure them—not exactly to secure them, but it was made for the purpose of conveying the title absolutely to Winslow

and Wilson for the iron that they put upon the road. That was the primal purpose of it.

Q. Under the deed of trust you made a conveyance, as the record here shows, to Winslow and Wilson of its road bed?

A. Yes, sir.

Q. This road and all its franchises?

A. Yes, sir.

Q. Did you ever have any knowledge, as Director of the Peoples Bank or otherwise, that Winslow and Wilson had ever conveyed the title which they held to this road, to the St. Louis and Southeastern Railway Company before the commencement of this action?

A. No, sir, I never had; on the contrary, I firmly believed that they owned it on the first day of January, 1876, both the equitable
155 and legal title, because I understood at that time they had made no contract, but that the Southeastern Company were about to make a proposition to lease the road of Winslow & Wilson.

Q. Do you remember when this first loan was made of twenty thousand dollars, by the Peoples Bank to the St. Louis and Southeastern Railway Company, guaranteed by Winslow & Wilson and others?

A. Well I don't remember the time; I remember the circumstance.

Q. State whether you were acquainted with J. F. Alexander?

A. Yes, sir.

Q. Do you know what position he held at that time?

A. He was at that time Treasurer of the St. Louis and Southeastern Railway Company consolidated.

Q. State whether, about the time of this loan, Mr. Alexander ever came to you in Belleville; if so, what his object in coming to you was, and what you did in pursuance of it.

A. He came to me to get me to go before the discount committee of the Peoples Bank and assist him in getting a twenty thousand dollars loan, and in pursuance of that I did go before them and, in his presence, I told them what I then believed to be true, and have seen nothing
156 since to change my belief, that the Belleville and O'Fallon Railroad was the property of Winslow & Wilson and that this endorsement was good.

Q. Did Mr. Alexander acquiesce in that statement?

A. He did; he and I talked about it ourselves.

Q. Mr. Winslow has stated in his testimony that this deed of trust and the conveyance under it was made with a knowledge of the Southeastern Railway Company to prevent owners of the land over which this Railroad run from collecting judgments which they might obtain against it—that this conveyance was made for the purpose of preventing that, and that you knew of that and advised it,—I wish you would make any statement that you desire to make upon that subject.

Q. As I understood Mr. Winslow, his testimony was to the effect that he did not desire the owners of the land on which this Railroad run to recover too great a compensation for their land, and that as agent of the Southeastern Railway Company, to prevent this, the title to this road which ought to have gone into the Southeastern Railway Company was

put into the hands of himself and Mr. Wilson. State now
157 whether you knew anything of that purpose?

A. I can only say what my purpose was: I don't know what their purpose was. My purpose was to conform to this resolution which I have just read of the O'Fallon Railroad Company, to give them this road in return for ironing it and putting ties on it. That was my purpose. It may have had the effect afterwards, and I may have told them that it probably would have that effect after that, and they may have taken their thoughts from my conversation. I don't know how that is. I know that at the time that this deed of trust was given, it was made for that prime purpose, of giving the road to Winslow & Wilson for putting iron on it in accordance with their written proposition. It would not have the effect of cutting out the land owners nor have the slightest effect on them at all.

Q. Mr. Winslow testified something in reference to a proposition to lease that took place some time after this sale. Do you know anything about it?

A. I don't know anything about it, but if the purpose of this investigation is to show notice in me, I can state the frame of my mind
158 at the time this attachment was levied, if it is necessary. I don't know anything about that leasing. I only know what I heard about it previous to this attachment.

Q. Did you hear anything from any of the officers of the Southeastern Railway Company?

A. No, sir, it was none of the officers that told me of it.

Q. Attorneys?

A. No, sir.

Q. Agents?

A. No, sir, but what was said accorded with my previous information, so that I immediately thought it to be true.

Q. Is there anything further in this case that you wish to say?

A. No, sir, that is all I wish to state, and I wouldn't have stated that if General Wilson had not been mistaken in regard to the cause of making this deed and had not forgotten this resolution.

Cross-examination.

Q. I will ask you if you had any legal connection with the St. Louis and Southeastern Railway at any time?

A. Yes, sir, I was the attorney of the St. Louis and Southeastern Railway Company from July, 1870, to April or May, 1873.

159 Q. I will ask you if, as attorney, you were familiar with the progress of work upon the various branches of the St. Louis and Southeastern Railway, if you were consulted with the reference to acquiring title, drawing up proper papers and so on?

A. Yes, sir, certainly, I was entirely conversant with the legal standing of the Company.

Q. State if you were the legal adviser of the Company in connection with the acquiring of the title in the O'Fallon Branch Railroad?

A. Yes, sir, I acquired the title for them.

Q. Were you also, at the time that you were trustee and director in the O'Fallon Branch, the attorney of the St. Louis and Southeastern Railroad Company?

A. I was never a director of the O'Fallon Railroad Company.

Q. Well, trustee.

A. Yes, sir, I was attorney of the St. Louis and Southeastern, and was attorney of the O'Fallon Railroad Company.

Q. I will ask you to state to the Court what steps you took for the purpose of transferring the title of the O'Fallon Branch Railway covering this right-of-way to the St. Louis and Southeastern Railway Company?

160 A. In connection with what passed between myself and the Company?

Q. Yes, covering your whole connection as attorney.

A. I cannot state that.

Q. Why can't you?

A. It is privileged.

Q. And you desire to avail yourself of your privilege?

A. I do, most assuredly.

Q. You decline then to state what steps as attorney you took?

A. I decline to state. If you put a specific question, if it is not privileged, I will answer it.

Q. I will ask you specifically, whether or not you advised the condemnation of the O'Fallon Branch by the St. Louis and Southeastern Railway Company, and whether, as attorney for that Railway, you filed the petition in the County Court before Judge Pieper?

A. I can say that I did.

Q. I will ask you whether at that time or about that time, you also advised the institution of different proceedings upon a different line to transfer the title of the Belleville and O'Fallon Branch to the St. Louis and Southeastern Railroad, and if so, what?

161 A. What I did to get it into the Southeastern?

Q. Yes, sir.

A. Well, I don't think it would be proper for me to state that, because that involves conversations that I had with Mr. Winslow and Mr. Alexander who were at the time representing my clients.

Q. I will ask you whether you did not in point of fact advise the transfer from Belleville and O'Fallon Branch to yourself, as trustee, of this right-of-way, and subsequently make the deed from yourself to Winslow & Wilson for the specific and sole purpose of transferring that title to the St. Louis and Southeastern Railway Company?

A. I will state this. I don't think that is privileged, that I apprehended at that time, although I didn't know it, that Winslow & Wilson would eventually deed that land to the Southeastern. I understood that but that was not told me by any of these gentlemen. I knew they were the contractors for this portion of the road, and I expected that the title would go into the Company if Winslow & Wilson were satisfied for the money they put into it.

Q. State to the Court whether or not it was not specifically

162 a part of the plan on your part, representing the St. Louis and

Southeastern Railway Company to acquire the title to the O'Fallon Branch Road, part of the plan conceived by you?

A. It was well known by myself, as a lawyer, that the title by deed of trust would have the effect of making a good title if it ever got into the Southeastern road, and I expected that in the future, some time, the Southeastern Company would avail themselves of Winslow & Wilson's title by purchase and paying them what they had in it.

Q. State whether or not you did not know from the first to the last of your connection with the St. Louis and Southeastern Railway Company that Winslow & Wilson were only acting as the fiscal agents of that Company?

A. I knew exactly to the contrary. I knew that Winslow & Wilson built the Southeastern under contract. I have seen it a number of times.

Q. Why don't you produce it?

A. There were some parts of their record which show that they had contracts to build the road. I don't know what other things they were.

Q. Now, I will ask you whether or not you did not on the eighth day of May, 1873, in a communication to the treasurer of the St. Louis and Southeastern Railway Company, before this railroad went into the hands of a receiver, call his attention specifically to the fact that
163 the St. Louis and Southeastern Railway Company in acquiring title to the Belleville and O'Fallon Branch Railroad should rely wholly upon the transfer to Winslow & Wilson through you?

A. This is a privileged communication.

(Counsel for interpleaders renew their offers of the letter from Mr. Thomas to Mr. Alexander, offered in evidence before.)

Q. You may state whether or not, to your knowledge, Winslow and Wilson ever put a dollar of money into the O'Fallon Branch Railroad of their own. You said that you knew they were contractors and that they did build it.

A. My relations to the Company are misapprehended entirely. I only held the relation at that time of attending to their court business. I knew nothing about their business further than the necessarily acquired knowledge by condemning the land for their railways, drawing the subcontracts and all that kind of thing. I knew that they purported to be the contractors to build these railroads, and I knew that they were to get certain bonds and moneys and that they did realize on them and build the road, and I knew that they furnished the money. I don't know who furnished it to them. I think George Opdyke and Company furnished it to them.

Q. You say you were counsel from 1870 to 1873?

A. I was its general counsel from July, 1870, to 1873, in the spring.

Q. Were you a Director during that time?

A. For some of the time.

Q. Wasn't you a Director of the St. Louis and Southeastern Railway Company from its organization?

A. No, I wasn't. I was for a time.

164 Q. Did your connection as counsel and Director cease at the same time?

A. I cannot really tell you: I think not. I think I ceased to be a Director before I ceased to be counsel.

Q. Your attention has been called to this loan by the Peoples Bank. State to the Court what your connection with the Peoples Bank was?

A. I was a Director of the Peoples Bank from July, 1870, till January, 1873, covering this whole period, but I was never a member of its discount committee or its loaning committee.

Q. The bank was located at Belleville, and did a general discount business?

A. Yes, sir, a general banking business at Belleville.

Q. You heard Mr. Pieper's testimony on the question as to the transfer of those consolidated bonds, from the Company to the bank?

A. Yes, sir.

Q. Are you the Thomas that he referred to as having acquired the title?

A. Yes, sir: I am. I bought them of him.

Q. When did you buy them?

A. I don't remember: some time after that sale.

Q. Before the attachment?

A. I don't remember that.

Q. State your best recollection: He says it was before the attachment.

A. I think it was subsequent to the attachment that I bought
165 them.

Q. Do you still hold them?

A. No, sir: I do not.

Q. Where are they now?

A. I don't know.

Q. When did you dispose of them?

A. I don't know that: it was some time in the last three or four months, or five months.

Q. To whom did you dispose of them?

A. I don't know that either.

Q. How much did you pay, and how much did you get for them?

A. That is a matter of private business: I don't think you have anything to do with that in this case. I gave two hundred dollars for them.

THE COURT.—It don't strike me as important.

Q. How many were there?

A. There were eighty thousand dollars, nominally.

Q. You paid two hundred dollars for them?

A. Yes, sir.

Q. I will ask you with reference to this consolidated bond, whether you understood that included the O'Fallon Branch Road, or not?

A. I knew that didn't.

Q. You knew the recitals of the road referred to the branches?

A. Yes, sir, but I knew of these subsequent conveyances: I
166 knew that the O'Fallon Road was only covered by this one mortgage.

Q. To George Opdyke and Company?

A. Yes, sir.
Q. That has been referred to?
A. Yes, sir.
Q. The mortgage of August the first, 1872?
A. Yes, sir, I knew that these subsequent mortgage bonds I bought had nothing to do with the O'Fallon Road.
Q. You may state whether the O'Fallon Branch Road, after the condemnation proceedings referred to, and after the trust deed to Winslow & Wilson, was ever in the possession of Winslow & Wilson and operated by him?
A. I don't believe it was.
Q. Isn't it a fact that the road was in possession of the St. Louis and Southeastern Railroad Company and operated by them down to the time the Receivers were appointed in this Court?
A. I know that to be a fact.
Q. So that from the time of the condemnation proceedings, and of course from the time of the trust deed, the O'Fallon Branch has been in the possession and operated by the St. Louis and Southeastern Railway Company and its agent, or by the Receivers appointed by this Court?
A. No, not all this time. There was a time before Winslow & Wilson turned it over that it was not operated at all. I don't think Winslow & Wilson ever operated it.
167 Q. Was it ever operated at all except by the St. Louis and Southeastern Railway Company?
A. I think not as a railway.
Q. I will ask you, if at the time and before this attachment of the Peoples Bank was laid upon the Belleville and O'Fallon Branch Railroad, it was in the possession of the Receivers appointed by the Court, and operated as part of the St. Louis and Southeastern Railway system?
A. That I do not know, but I am morally certain that that is so: I do not know it, but I think it very much.
Q. You filed a petition?
A. I learned it was so. It is a fact: there is no doubt about that, although, I do not know it.

And now the Court found the said property in said interplea described to be the property of said interpleaders, and that it was not subject to the said attachment, and was not the property of Edward F. Winslow and James H. Wilson at the date of levy of said attachment, but was the property of the interpleaders; to which ruling and decision of the Court the plaintiff, by its counsel, at the time excepted.

And the Court ordered said attachment to be dismissed, and to this ruling and decision of the Court plaintiff, by its counsel, at the time excepted, and inasmuch as the matters and things above set forth are not of themselves matters of record in said cause, the plaintiff presents this its Bill of Exceptions, which it prays may be signed and sealed and made part of the record, which is done.

S. H. TREAT. [SEAL.]

(*Endorsed.*) Filed September 4, 1877.

J. A. JONES, *Clerk.*

168 And then afterwards, to-wit, on said 4th day of September, in the year aforesaid, came said plaintiff, by its attorney, and filed in said Clerk's office its bond in said cause, which said bond is in the words and figures following, to-wit:

Bond.

Supreme Court of the United States.

The Peoples Bank of Belleville,
vs.
Edward F. Winslow and James H. Wilson, late partners under the firm name and style of Wilslow and Wilson. } *Attachment.*

George Opdyke and Philo C. Calhoun, interpleaders.

Know all men by these presents, that we, the Peoples Bank of Belleville are held and firmly bound unto the said George Opdyke and Philo C. Calhoun, in the penal sum of five hundred dollars, to be paid to the said George Opdyke and Philo C. Calhoun, their executors and administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated this 4th day of September, A. D. 1877.

169 Whereas, the above named Peoples Bank of Belleville hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the Circuit Court of the United States for the Southern District of Illinois.

Now, therefore, the condition of this obligation is such that if the above named Peoples Bank of Belleville shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE PEOPLES BANK OF BELLEVILLE, [L. S.]
by C. W. THOMAS, its Attorney.
CHARLES W. THOMAS. [L. S.]

Approved Sept. 4th, 1877. S. H. TREAT, *District Judge.*

(*Endorsed.*) Filed September 4, 1877.
J. A. JONES, *Clerk.*

Certificate.

United States of America, Southern District of Illinois, *ss.*

I, John A. Jones, Clerk of the Circuit Court of the United States, in and for said Southern District of Illinois, do hereby certify that

170 the foregoing is a *true and correct copy* of all the papers filed and proceedings had thereon, in a certain suit lately pending in said Court, wherein, *the Peoples Bank of Belleville* is plaintiff, and *Edward F. Winslow and James H. Wilson*, late partners as Winslow and Wilson, are defendants, and Philo C. Calhoun and George

Opdyke are interpleaders, as fully and completely as the same appear of file and of record in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield in said district, this sixth day of October, in the year of our Lord eighteen hundred and seventy seven, and of our independence the hundred and second year.

[L. S.] J. A. JONES, *Clerk.*

IN THE

Supreme Court of the United States.

No. 292.

THE PEOPLE'S BANK OF BELLEVILLE,

Plaintiff in Error,

vs.

PHILO C. CALHOUN AND GEORGE OPDYKE,

Defendants in Error.

In Error to the Circuit Court of the United States, for the Seventh Circuit and Southern District of Illinois.

MOTION TO DISMISS WRIT OF ERROR.

B. H. BRISTOW,
W. S. OPDYKE,
Of Counsel for Defendants in Error.

Supreme Court

OF THE UNITED STATES.

THE PEOPLE'S BANK OF BELLVILLE, Plaintiff in Error, *vs* PHILO C. CALHOUN and GEORGE OPDYKE, Defendants in Error.	October Term, 1879; No. 292.

In error to the Circuit Court of the United States, for the Seventh Circuit and Southern District of Illinios.

And now, to wit, on the ninth day of February, 1880, come the defendants in error, Philo C. Calhoun and George Opdyke, by their counsel, and move this Honorable Court to dismiss the writ of error herein, and for specifications for grounds of this motion they show—

First. That the issue joined in the Court below between the plaintiff and these defendants in error, was regularly and properly triable before a jury; but that the same was submitted to and tried by the Court without the intervention of a jury, and that such submission was not made in the manner provided by the Act of Congress in that behalf; in this, that the parties or their attorneys of record did not file in said Court, or with the Clerk thereof, a stipulation in writing waiving a jury.

Second. That the said writ of error is irregular, and insufficient to give this Honorable Court jurisdiction to review the action of the Court below in this case.

Brief of Argument for Motion to Dismiss Writ of Error.

STATEMENT.

On the 23d day of March, 1876, the People's Bank of Belleville, by its agent A. G. Bagley, filed in the Circuit Court of the County of St. Clair, and State of Illinois, an affidavit alleging that Messrs. Winslow & Wilson were indebted to the said bank, and that they were non-residents of the State of Illinois, and thereupon executed a bond and sued out a writ of attachment, commanding the Sheriff of said County to attach so much of the estate, real and personal, of said Winslow & Wilson as should be of value sufficient to satisfy said debt and costs (fols. 5, 6, 7, 8 and 9).

On the same day the Sheriff levied upon the "right of way, * * * railroad track, iron, spikes, ties, bridges, culverts, embankments, switches, frogs and road-bed " of a certain railroad known as the Belleville & O'Fallon Railroad (fol. 10).

On the 7th of April, 1876, the said bank filed in said Court a declaration in assumpsit against said Winslow & Wilson, who were proceeded against as non-residents (fols. 13, 14, 15, 16, 17 and 18).

Subsequently the case was removed to the Circuit Court of the United States for the Southern District of Illinois, and at the January Term, 1877, of said Court Philo C. Calhoun and George Opdyke filed their interpleader in said cause, claiming that said attached estate and property was at the time of the seizure the property of themselves, as trustees, and not the property of said Winslow & Wilson, or either of them (fols. 27 and 28).

At the same Term of said Court the bank filed its answer to the interpleader asserting that the title to said attached property was in said Winslow & Wilson, and not in said Calhoun and Opdyke (fol. 29).

On the 10th day of April, 1877 the Court gave

judgment for the plaintiff against the defendants, Winslow & Wilson (fols, 32 and 33).

On the 4th day of September next thereafter, the Court entered the following judgment on the issue joined between the bank and said Calhoun and Opdyke, viz.:

"PEOPLE'S BANK OF BELLEVILLE

"*vs.*

"EDWARD F. WINSLOW and JAMES "H. WILSON, partners, under "name and style of WINSLOW & "WILSON. } Attachment.

"On the interpleader of George Opdyke and "Philo C. Calhoun, claiming the property attached "in this cause, and the answer of the plaintiff "thereto.

"And now, on this fourth day of September, "1877, come the said George Opdyke and Philo C. "Calhoun, by their counsel, and the plaintiff by its "counsel, and submit to the Court all questions "arising on the interpleader and the answer there-"to, and the Court having heard their proof and "allegations, and being sufficiently advised in the "premises, finds that the property levied on by the "attachment issued in this cause was, at the date "of this levy thereof, the property of the interplead-"ers, George Opdyke and Philo C. Calhoun, and "not the property of Edward F. Winslow and "James H. Wilson. It is, therefore, ordered by "the Court that the proceedings in attachment in "this cause be dismissed at the costs of the plain-"tiff. And, therefore, the plaintiff tenders its bill "of exceptions, which is signed and made part of "the record in this cause. And now, on motion of "plaintiff, a writ of error is allowed in this case to

" the Supreme Court of the United States, on the " plaintiff entering into bond to the persons inter- " pleading herein, in the penalty of five hundred " dollars, conditioned as the law directs" (fol. 34).

This is the judgment brought here for review by the Writ of Error.

ARGUMENT.

The issue joined in this case having been submitted to and tried by the Court, without a jury, and the parties having failed to file a stipulation in writing waiving a jury, they are concluded by the judgment, and have lost the right to have it reviewed by this Court.

I.

Before the passage of the Act of March 3, 1865, it had been repeatedly held by this Court that parties might waive the right of trial by jury, and that judgment by the Court in such cases would not be invalid.

Bank of Columbia vs. Okely, 4 Wheat., 235.
Parsons vs. Armor, 3 Peters, 425.
Hiriart vs. Ballon, 9 Peters, 156.
Guild vs. Frontin, 18 How., 135.
Suydam vs. Williamson et al., 20 How., 427.
Kelsey et al. vs. Forsyth, 21 How., 85.
Campbell vs. Boyreau, 21 How., 223.
Burr vs. Des Moines Co., 1 Wall., 99.

But it was also held that this Court would not review the decision of the Court below where the parties had agreed to waive a jury and submit to the Court all questions of law and fact, whether with or without a stipulation in writing.

Guild vs. Frontin, 18 How., 135.
Kelsey et al. vs. Forsyth, 21 How., 85.
Suydam vs. Williamson et al., 20 How., 427.
Campbell vs. Boy., 21 How., 223.
Burr vs. Des Moines Co., 1 Wall., 99.

In *Kelsey et al. vs. Forsyth*, the parties filed in the Court below (the U. S. Circuit Court for Illinois) an agreement waiving a jury, and reserving to either party the right to avail himself, in the Supreme Court, of any erroneous ruling in the Circuit Court, as though the case had been submitted to a jury, with liberty to either party, if it should be necessary to the hearing of the cause in the Supreme Court, to treat the evidence introduced in the nature of a special verdict. This was according to the statute of Illinois, and the practice in the Courts of that State.

Chief-Justice Taney, delivering the opinion of the Court, said: "It is sufficient to say that the agree-
" ment of parties cannot authorize this court to re-
" vise a judgment of an inferior Court in any other
" mode of proceeding than that which the law pre-
" scribes, nor can the laws of a State regulating
" proceedings in its own Courts, authorize a District
" or Circuit Court sitting in such State to depart
" from the mode of proceeding and rules prescribed
" by the acts of Congress."

In *Graham vs. Boyne* (18 How., 60), which was also brought up by writ of error to the Circuit Court for the District of Illinois, the parties had filed in the Court below an agreement substantially like that in *Kelsey vs. Forsyth*, Mr. Justice Grier, speaking for the Court, said: " Counsel may agree, as in
" this case, to submit both the facts and law to the
" decision of the Court, but they cannot by agree-
" ment introduce a new practice into this Court.
* * * * " The practice of this Court is regula-
" ted by the common law and acts of Congress only.
" If the parties agree to submit the trial both of law
" and facts to the Judge, they constitute him an ar-
" bitrator or referee whose award must be final
" and conclusive between them; but no consent can
" constitute this Court appellate arbitrators."

II.

Section 4 of the Act of March 3d, 1865, which regulates the manner of submitting issues of fact to the Court without the intervention of a jury, and providing for review of such cases by this Court on writ of error, is reproduced in the Revised Statutes in two sections—the first of which is to be found in Chapter VII, which relates to the jurisdiction of Circuit Courts, and the second in Chapter XI, entitled "Supreme Court Jurisdiction."

They are as follows:

"*Sec. 649. Issues of fact in civil cases in any "Circuit Court may be tried and determined by the "Court, without the intervention of a jury, when- "ever the parties, or their attorneys of record, file "with the clerk a stipulation in writing waiving a "jury. The finding of the Court upon the facts, "which may be either general or special, shall have "the same effect as the verdict of a jury.*"

"*Sec. 700. When an issue of fact in any civil "cause in a Circuit Court is tried and determined "by the Court without the intervention of a jury, "according to section six hundred and forty-nine, "the rulings of the Court in the progress of the "trial of the cause, if excepted to at the time, and "duly presented by a bill of exceptions, may be re- "viewed by the Supreme Court, upon a writ of "error, or upon appeal; and when the finding is "special, the review may extend to the determina- "tion of the sufficiency of the facts found to support "the judgment.*"

III.

Neither the act of 1865, in its original form, nor as subdivided in the R. S., authorizes this Court to review *all* cases submitted to and tried by the Court without the intervention of a jury. The right of review, secured by Sec. 700, is limited to cases "tried and determined by the Court without

"the intervention of a jury *according to Sec. 649;*" that is, to cases wherein "the parties, or their attor-" neys of record, file with the clerk a stipulation in " writing waiving a jury."

The jurisdiction of this Court to review the judgment and rulings of an inferior Court is derived solely from acts of Congress, and can neither be enlarged or diminished by consent of parties, or by State statutes. The Act of March 3, 1865, confers upon this Court power to review a certain class of cases which had not theretofore been reviewable here. The act defines clearly the cases to which this new power of review extends. It prescribes one mode, and one only, whereby cases at law, tried by the Court without a jury, may be prepared for review by this Court, viz.: by filing " with the Clerk a stipulation in writing waiving a jury." When this has been done, the rulings of the Court in the progress of the trial, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed by this Court. But such rulings, although excepted to at the time, and properly presented by bill of exceptions, are reviewable only where the parties have complied with the plain requirements of the statute, by filing the stipulation in writing. The written stipulation waiving a jury was not, as we have seen, necessary to the validity of the judgment, for before the passage of the act parties could submit all questions of law and fact to the Court without such stipulation, and the judgment would be valid, though not reviewable by this Court.

The Act makes the filing of such a stipulation in writing a pre-requisite to the exercise of the power of review. The language of the statute is plain—so plain that there is no room for construction. It prescribes how the record shall be prepared, and limits the inquiry in this Court. The record in this case does not contain a transcript of any "stipulation in writing waiving a jury," nor does it refer to one as having been filed below. Indeed, it is obvious from the language of the judgment order

(folio 34) that none was filed. Hence this case is not within the category of cases which the act makes reviewable by this Court.

In *Flanders vs. Tweed* (9 Wall., 428), Mr. Justice Nelson, speaking for this Court, said: "It is impossible to misunderstand the condition upon which, according to the Act of March 3d, 1865, the parties are authorized to waive a trial by jury and substitute the Court, and, at the same time, save to themselves all the rights and privileges which belong to them in trials by jury at common law. That condition *is the filing with the clerk a written stipulation*, signed by the parties or their attorneys."

The precise question raised by this motion was decided by this Court in *Kearney vs. Case* (12 Wall, 275). In that case it was held that a written stipulation in the Circuit Court was essential to a review by this Court. Mr. Justice Miller, delivering the opinion, said: "We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the Court unless they do so by written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they *must first file their written stipulation*, and must then ask the Court to make a finding of such facts as they deem essential to the review, and ask the ruling of the Court on points to which they wish to except. If this is not done, the parties consenting to waive a jury stand, as they did before the statute, concluded by the judgment of the Court on all matters submitted to it. This we understand to be the effect of the opinion in Flanders vs. Tweed (12 Wall, 283)."

The learned Justice further said in that case:

"In a case where there is no evidence that it was submitted in writing under the statute, but the record shows affirmatively that the parties waived a jury, we hold such evidence of waiver to be suf-

"ficient to support the judgment, but not sufficient "to authorize a review of the rulings of the Court at "the trial."

IV.

In view of the plain language of the Act of 1865, and of the clear exposition of it by this Court, it is submitted that this case is not reviewable, and that the writ of error should be dismissed.

B. H. BRISTOW,
W. S. OPDYKE,
Of Counsel for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

No. 292.

THE PEOPLES BANK OF BELLEVILLE, PLAINTIFF IN ERROR,

—*vs.*—

EDWARD F. WINSLOW and JAMES H. WILSON, late partners as Winslow & Wilson. GEORGE OPDYKE and PHILO C. CALHOUN, INTERPLEADERS.

In error to the Circuit Court of the United States for the Southern District of Illinois.

Suggestions in Opposition to the Motion to Dismiss the Writ of Error.

CHARLES W. THOMAS,
COUNSEL FOR PLAINTIFF IN ERROR.

CHICAGO:
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES,

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In error to the Circuit Court of the United States for the Southern District of Illinois.

Suggestions in Opposition to the Motion to Dismiss the Writ of Error.

STATEMENT.

This cause was removed from the State Court by a mere stipulation of counsel, which recites no facts which could give the Circuit Court jurisdiction, (fol. 19,) and no such facts appear in the Record.

After the cause was so removed, the Circuit Court committed various errors, which would be apparent from the Record, if it contained no bill of exceptions.

The first, second, third and fourth assignments of error relate to that portion of the Record outside the bill of exceptions, and are predicated upon decisions of the court not made at or during the progress of the trial. (*Brief of Plaintiff in Error, p. 9.*)

ARGUMENT.

Where the Record discloses errors not committed during the progress of the trial, this court will reverse, although the parties may have stipulated that the Circuit Court might try the cause without the intervention of a jury, and failed to put their stipulation in writing.

I.

The learned counsel for defendants in error seem to misapprehend the nature of the Record, and of the Assignments of Error thereon, and that misapprehension makes it unnecessary to discuss the point they have raised. In their argument it seems to be taken for granted that all the errors assigned relate to matters which occurred "*in* "*the progress of the trial*," but the court has already seen that such is not the case. The first four assignments of error could be properly brought to the attention of this court, if no bill of exceptions was in the Record. If it was sought to reverse this judgment on account of such errors only as might have been committed at the trial, it would be necessary to attack the position assumed by the counsel; but here one of the chief errors assigned is that the Circuit Court was wholly without jurisdiction, and it is contended that this is apparent from the Record, without any reference whatever to what occurred at or during the trial. Other errors almost as grave as the one last mentioned, are also apparent, as is contended by Plaintiff in Error, upon that portion of the Record outside the Bill of Exceptions, and this judgment might be properly reversed, and all the orders of the Circuit Court set aside, without any review of the rulings of that court made upon the trial. It would seem, therefore, that the sections of the statute quoted by counsel, as well as the authorities by them cited, are not sufficient to sustain the position that this writ of error ought to be dismissed.

II.

The jurisdiction of this court to review this case, is conferred by Section 691 of Chapter 11, of the Revised Statutes, which is as follows:

"All final judgments of any Circuit Court, or of any "District Court, acting as a Circuit Court, in civil actions "brought there by original process, or removed there "from the courts of the several States, and all final judg- "ments of any Circuit Court in civil actions, removed "there from any District Court, by appeal or writ of error, "where the matter in dispute, exclusive of costs, exceeds "the sum or value of five thousand dollars, may be re-ex- "amined and reversed or affirmed in the Supreme Court "upon a writ of error."

This section provides for a review of any final judgment of the Circuit Court, and authorizes an inspection of what is termed the "Record." Section 700, which is quoted by counsel for defendants in error, provides upon what terms or conditions a bill of exceptions may be made part of a record when the cause is tried by the court without a jury. Without a bill of exceptions, the ruling made during the progress of the trial could not be preserved in the record, and it would not disclose anything done or omitted by the court at the trial, but this would in no wise affect that portion of the record which did not relate to the trial.

Questions of pleading, sufficiency of process and returns, jurisdiction, &c., might, and doubtless do often arise upon some records in which there has been no bills of exceptions incorporated. A writ of error may be prosecuted to reverse a judgment for errors apparent on the record, whether that record contains any finding or bill of exceptions, or not. This is too plain for doubt, and authorities need not be cited. The case of *Kearney* v. *Case*, 12 Wall., 275, cited and relied upon by counsel in the argument, expressly recognizes the

distinction alluded to. In that case there was no assignment of error which brought to notice anything other than rulings of the Circuit Court made on the trial, and the language of the learned judge who delivered the opinion is such as to leave no doubt that, had the record disclosed errors of the nature complained of here, the decision would have been different.

The argument made by the counsel would probably be more effective if urged upon the hearing, against the power of this Court to open that portion of the record which purports to contain the bill of exceptions, and it then might be necessary for plaintiff in error, if it desired to have the court review the rulings of the Circuit Court made at the trial, to combat the position of the counsel, but as the case now stands, with errors assigned which have no reference to such rulings, it is respectfully submitted that this Court will consider those assignments, and send forward to the hearing the question whether the bill of exceptions will be examined. If the plaintiff in error is correct in its views of this case, all discussion relating to the rulings of the Circuit Court on the trial will be unnecessary.

It is in conclusion, confidently contended that there is no authority to support the proposition that a failure of the parties to stipulate in writing that a cause may be tried by a Circuit Court, waives the right of either of them to present here for review so much of the record as has no reference to the trial or anything that occurred during its progress, and it is submitted that this motion ought therefore to be denied.

CHARLES W. THOMAS,
Counsel for Plaintiff in Error.

No. .....

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1879.

THE PEOPLE'S BANK OF BELLEVILLE, PLAINTIFF IN ERROR,

vs.

EDWARD F. WINSLOW AND JAMES H. WILSON, LATE PARTNERS AS WINSLOW & WILSON.

PHILO C. CALHOUN AND GEORGE OPDYKE, INTERPLEADERS.

Statement and Brief of the Argument on behalf of Plaintiff in Error.

CHARLES W. THOMAS,
Counsel for Plaintiff in Error.

No.....

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1879.

THE PEOPLE'S BANK OF BELLEVILLE, Plaintiff in Error,

vs.

EDWARD F. WINSLOW and JAMES W. WILSON, late partners as Winslow & Wilson,

PHILO C. CALHOUN and GEORGE OPDYKE, Interpleaders.

STATEMENT OF THE CASE.

[PRINTED RECORD REFERRED TO.]

This was an action commenced by Attachment to the April Term, 1876, of the Circuit Court, of the County of St. Clair, in the State of Illinois. The People's Bank of Belleville, sued Edward F. Winslow and James H. Wilson, lately partners as Winslow & Wilson, to recover of them the amount of two notes made to plaintiff by the St. Louis and Southeastern Railway Company and indorsed by them. The Sheriff levied the writ March 23, 1876, on the Belleville and O'Fallon Railroad, which was wholly within his county, as the property of Winslow and Wilson the defendants, and on the same day recorded the Certificate of Levy. (*Record pp.* 6, 7.) On the 1st day of May, 1876, the officer summoned the Belleville and O'Fallon Railroad Company as garnishee. (*Record p.* 8.) At the said April Term of the State Court, the cause was by consent of parties, and without

any petition or bond or the presentation of any facts showing any grounds for removal, removed to the Circuit Court of the United States. (*Record p.* 11.) The affidavit filed by plaintiff upon which the attachment issued, shows that Winslow and Wilson were *non-residents* of the State of Illinois; (*Record p.* 5,) but there is nothing in the Record to show of what State the defendants were *citizens*, nor is there disclosed by the Record any fact which would authorize the removal of the cause to the United States Court under the Statute providing for such removals.

The Plaintiff in Error contends, upon this state of facts, that the Circuit Court of the United States was without any jurisdiction in this cause, and that all its orders and judgments made therein, should be reversed, with directions to remand the case to the State Court.

On the 15th day of March, 1877, after the cause had been removed to the Circuit Court of the United States, George Opdyke and Philo C. Calhoun appeared and filed an interplea, by which they claimed to own the railroad levied upon, and set up that it was not the property of Winslow & Wilson, or either of them, and not subject to the attachment. On the next day the Bank took issue on the interplea and averred that the property levied upon was subject to the attachment at the time of the levy, as the property of Winslow & Wilson. (*Record p.* 15.)

This interplea was filed in pursuance of the Statute of Illinois, which is as follows:

"In all cases of attachment, any person, other than the defendant, claiming the property attached, may interplead, verifying his plea by affidavit, without giving bail, but the property attached shall not thereby be replevied; and the Court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of property." * * *

Rev. Stat. Ills. 1874, *Chap.* 11, *sec.* 29.

On the 10th day of April, 1877, and during the January Term of the Court, the cause was heard. A jury was waived.

The Court found the issues for the plaintiff, gave it judgment against Winslow & Wilson for $43,266.$\frac{66}{100}$, and ordered a special execution to issue on the judgment, directing the marshal to sell the attached property, describing it. The Court also gave leave to plaintiff to file interrogatories to the garnishee, the Belleville and O'Fallon Railroad Company, which was required to answer the same by the first Monday in June, 1877, which was the first day of the June Term, and the cause was continued. (*Record p.* 17.)

This garnishee was summoned and these interrogatories were filed in pursuance of the provisions of Statute of Illinois, which are as follows:

"When the Sheriff or other officer is unable to find property of any defendant, sufficient to satisfy any attachment issued under the provisions of this act, he shall summon the persons mentioned in such writ as garnishees, and all other persons within his county, whom the creditor shall designate as having any property, effects, choses in action or credits, in their possession or power, belonging to the defendant; or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ; the persons so summoned, shall be considered as garnishees, and the Sheriff shall state in his return, the names of all persons so summoned, and the date of such service on each."

Rev. Stat. Ills., Chap. 11, *sec.* 21.

"When any person is summoned as a garnishee upon any process of attachment or garnishee summons issued out of any court of record, the plaintiff shall, at or before the term at which the garnishee is bound to, appear, or within such further time as the Court shall allow, exhibit and file, all and singular, such a'e gations and interrogatories, in writing, upon which he shall be desirous to obtain and compel the answer of any and every garnishee, touching the lands tenements, goods, chattels, money, choses in action, credits and effects of such defendant, and the value thereof, in his possession, custody or charge, or from him due and owing to the said defendant, at the time of the service of the said writ, or at any time after, or which shall or may thereafter become due; and it shall be the duty of every garnishee to exhibit and file under his oath or any affirmation, within ten days after he shall be notified of the filing of such interroga-

tories, or if notice of the filing of the same shall have been served upon him, then on or before the third day of the next succeeding term after the term at which such interrogatories are filed, full, direct and true answers to all and singular the allegations and interrogatories by the plaintiff so exhibited and filed; but in no case shall the garnishee be compelled to answer before the third day of the return term of the garnishee process.

Ib., Chap. 62, *sec.* 5.

At the June Term, 1877, the issues arising upon the interplea were tried without the intervention of a jury, and the Court found the property, which at a prior term it had ordered to be sold as the property of Winslow & Wilson, to be the property of Opdyke and Calhoun, and dismissed the Attachment in which there was final judgment at the prior term.

Upon this state of facts the Plaintiff in Error contends that the Circuit Court erred in finding the property attached to be the property of Opdyke and Calhoun, and in dismissing the Attachment, because,

1. This was an original Attachment, and there was a good cause of action and judgment already rendered against defendants at a prior term, and the Court had no power to dismiss the action in any event, except as to property not belonging to defendants at the time of the levy, and because,

2. The dismissal deprived plaintiff of its right to resort to the garnishee, who was properly in Court, and because,

3. After the Court had at one term, found the property levied on to be subject to the Attachment and ordered its sale, it was not competent at a subsequent term for the same Court to give judgment that the same property was not subject to the attachment.

All the questions above alluded to arise upon the Record, exclusive of the Bill of Exceptions.

Upon the trial of the issues raised upon the interpleader of Opdyke and Calhoun the following state of facts was developed:

The Belleville and O'Fallon Railroad Company, which was organized in 1869, procured a right of way and graded a road-bed in 1870 from Belleville to O'Fallon, in St. Clair County, Illinois. The St. Louis and Southeastern Railway Company, which was also organized in 1869, built its road from St. Louis through Belleville and across Illinois. Winslow was the President and Wilson the Vice-President of the Southeastern Company, and Winslow and Wilson were the contractors who graded the O'Fallon road.

At a meeting of the Directors of the O'Fallon road held, in the early part of 1871, Winslow & Wilson submitted a proposition to put iron upon the graded road-bed if the Company would issue $80,000 of its bonds, secured by a deed of trust on all its property. The substance of the proposition was that Winslow & Wilson would complete the road, if the Company would give it to them when it was finished. The proposition was accepted, and the O'Fallon Company, on the 13th day of June, 1871, issued $80,000 of its bonds, payable in seven days, and secured them by a deed of trust of that date on the property levied on by this Attachment, made to Charles W. Thomas as trustee, and empowering him to sell the incumbered property upon default being made in the payment of the bonds.

On the 30th day of June, 1871, seventeen days subsequent to the making, and four days subsequent to the recording of the deed of trust above mentioned, the St. Louis and Southeastern Railway Company filed in the proper local Court, its proceedings to condemn the road-bed of the O'Fallon Company. Neither the trustee nor the bond-holders in the deed of trust last mentioned were parties to these condemnation proceedings, and they vested the title to the property in the Southeastern Company, subject to the lien of the deed of trust. This title was perfected on the 5th day of July, A. D. 1871.

On the 26th day of July, 1871, default having been made in the payment of the bonds of the O'Fallon Company, the trustee

named in the deed of trust sold the property in question to Winslow & Wilson, and made them a trustee's deed for the same, bearing date of the day of sale. This deed was recorded April 3rd, 1875.

It cannot be questioned that this deed placed the superior legal title to the property conveyed by it, in Winslow & Wilson the grantees, where it was at the time the lien of this Attachment took effect.

The St. Louis and Southeastern Railway Company went into possession of the O'Fallon road as soon as it was ironed in 1871, and remained in such possession until the 21st day of October, 1874, when a Receiver of all its property was appointed by the Circuit Court of the United States for the Southern District of Illinois, and since that time the Receiver has had possession.

On the first day of August, 1872, the St. Louis and Southeastern Railway Company, which had become consolidated with other companies, not including however, the Belleville and O'Fallon Railroad Company, made a deed of trust to George Opdyke and Philo C. Calhoun, the interpleaders, to secure the bonds of the grantor to the amount of $21,000 per mile, and conveyed all the railroad of the grantor as well as all its branches and all its real and personal property, and the rents, issues, tolls and profits thereof. This deed was recorded October 14, 1872.

On the same day the same Company made its deed of trust to the same trustees, conveying to them, to secure bonds to the amount of $150,000 due in 1894, all the branch lines of the grantor built or to be built, and particularly the branch line from Belleville to O'Fallon, which is the property in question. This deed was recorded October 15th, 1872.

On the 15th day of October, 1872, some doubt having arisen as to the priority of the deeds of trust last mentioned as liens upon the O'Fallon Road, the Southeastern Company made a written agreement with the said trustees, that the deed to secure $150,000 should be and was the first lien, and that the other had been inadvertently recorded first. This agreement was recorded October 25, 1872.

On the trial the interpleaders were permitted to read in evidence against the objections of plaintiff, a deed from Winslow & Wilson and their wives to Opdyke and Calhoun, dated January 4, 1876, acknowledged by Winslow and wife March 20th, 1876, and by Wilson and wife March 27, 1876, and not recorded until April, 1876. (*Record p.* 36.) This deed purports to convey the property in dispute to the grantees as trustees under the deed of trust above named to secure $105,000, and provides that it shall be void if the Company pays the debt. The plaintiff objected to this deed because of its defective acknowledgements; because it did not tend to prove the issue made, and was irrelevant thereto.

This was the first instrument offered in evidence purporting to convey the title of Winslow & Wilson, which they had acquired by the trustee's deed executed by Charles W. Thomas bearing date July 26, 1871. The plaintiff in error contends that, being acknowledged and recorded after the levy of the Attachment in this case, it was not pertinent or competent evidence to show legal title in the grantees therein, who are the interpleaders here, at the time of such levy. It seems to have been admitted on the theory that in this proceeding, the equitable title is a proper subject of inquiry, which plaintiff in error denies.

The interpleaders were then permitted to read in evidence against the objections of plaintiff, a deed from Winslow & Wilson and their wives to the St. Louis and Southeastern Railway Company. This deed bears date January 5th, 1876, was acknowledged by Winslow and wife, March 20th, 1876, and by Wilson and wife, March 27th, 1876, and not recorded until April, 1876. (*Record p.* 39.) It was never acknowledged by Wilson, and purports to convey the property in dispute subject to the deed of trust for $105,000 to Opdyke and Calhoun. The Plaintiff's objections to the reading of this deed in evidence were similar to the ones made to the reading in evidence of the one last named.

Upon the objections made to the reading in evidence of the two deeds last mentioned, arises the question whether, in this proceeding, there can be any inquiry into the equitable title.

In pursuance of the theory, that the equitable title was the proper subject of inquiry under an interplea in Attachment, it was further proved at the trial of the issue on the interplea, that one Charles W. Thomas was a director of the plaintiff, the People's Bank of Belleville, from 1870, to January, 1873, but was never a member of its loaning or discount committee—that he was general counsel of the St. Louis and Southeastern Railway Company from 1870, until the Spring of 1873, and previous to 1873, had been a director of the Company—that he acquired the title to the O'Fallon road as counsel for the Southeastern by condemnation—that he was the same person named in the deed of trust made by the O'Fallon Company for the benefit of Winslow & Wilson—and that when the Bank lent this money to the Southeastern Company, he went with the Treasurer who negotiated the loan and told the discount committee of the Bank in the presence of the Treasurer, that the title to the O'Fallon road was in Winslow and Wilson, and this was not denied.

There was also evidence tending to show that Winslow & Wilson only held the title they acquired to the O'Fallon road in trust for the Southeastern Company, and that the said Charles W. Thomas, while he was counsel of the Southeastern Company obtained knowledge of the trust.

The Plaintiff in Error on this state facts, contends that even if the equitable title was a proper subject of inquiry, the said Plaintiff was not chargeable with notice of any equities by the possession of the Southeastern Company, of which interpleaders are grantees, because that possession was properly referable to the condemnation proceedings by which the Southeastern Company acquired the property from the O'Fallon Company, and those proceeding were not of such a character as to affect a lien of the deed of trust under which Plaintiff, by its Attachment, claims to hold the property. And the Plaintiff in Error further contends, that even if this investigation was not limited to the legal title, it cannot be charged with notice of equities which came to the knowledge of one of its directors, when acting as counsel for the Southeastern Company, as he was by law forbidden to communi-

cate to Plaintiff in Error any knowledge he may have acquired as such counsel.

It was further proved, that the St. Louis and Southeastern Railway Company deposited with the People's Bank of Belleville, as security for the loan witnessed by the notes sued on in this case, $80,000 of the bonds secured by its deed of trust, upon all its property to Opdyke and Calhoun, bearing date August 1st, 1872, and that the bonds were sold by the Bank at public sale, at which the Company's attorney was present for a nominal sum, as they were of small value.

ASSIGNMENTS OF ERROR.

Upon the Record and Proceedings aforesaid the Plaintiff in Error, The People's Bank of Belleville, assigns for error the following:

I. The said Circuit Court of the United States erred in assuming and taking jurisdiction of the said cause.

II. The said Court erred in trying said cause and rendering judgment therein.

III. The said Court erred in dismissing the said Attachment.

IV. The said Court erred in finding at the June Term, A. D. 1877, that the property levied upon by virtue of the writ of Attachment, to-wit: the Belleville and O'Fallon Railroad, was not subject to the Attachment, when it had at a previous term ordered the same property to be sold to satisfy the Attachment.

V. The said Court erred in permitting the deed from James H. Wilson and wife, and Edward F. Winslow and wife, to George Opdyke and Philo C. Calhoun, dated January 4th, 1876, and recorded in April, 1876, and purporting to convey the property levied on in said Attachment, (*Record pp.* 36 *to* 39,) to be read in evidence on the trial of the issue made on the interplea of Opdyke and Calhoun.

VI. The said Court erred in permitting the deed from James H. Wilson and Edward F. Winslow and their wives to the St. Louis and Southeastern Railway Company, (consolidated) dated January 5th, 1876, and recorded in April, 1876, (*Record pp.*

39 *to* 43) and purporting to convey the property levied on in said Attachment, to read in evidence on the trial of the issue made on the trial of the interplea of Opdyke and Calhoun.

VII. The said Court erred in denying the motion of plaintiffs below made on the trial at the time the interpleaders closed their testimony, for judgment that the property levied upon was subject to the said Attachment as the property of Winslow and Wilson the Defendants.

VIII. The said Court erred in rendering Judgment, that said property was the property of said Opdyke and Calhoun at the time said Attachment was levied thereon.

BRIEF OF THE ARGUMENT.

[REFERENCES ARE MADE TO PRINTED RECORD.]

I.

The Circuit Court had no jurisdiction, and the cause ought therefore to be reversed, with directions to remand the same to the State Court. It was removed from the State Court by consent of parties, bond and petition being waived, and the Record does not show the existence of any fact or facts which would authorize the removal. The Plaintiff is a corporation of Illinois, and the affidavit in Attachment shows that the Defendants were *non-residents* of Illinois when the action was commenced. (*Record p.* 5.)

It must appear from the Record that the Circuit Court had jurisdiction, or this Court will reverse.

Kennedy v. The Bank, 8 *How.*, 586.

Dred. Scott v. Sandford, 19 *How.*, 393.

And the stipulation of the parties upon which this cause was removed to the United States Court, (*Record p.* 11,) recites no facts which authorized the removal. It was a mere consent that it should take place, and was wholly insufficient to confer jurisdiction.

Dred. Scott v Sandford, 19 *How.*, 393.

The Lucy, 8 *Wall.*, 309.

Railway Co. v. Ramsay, 22 *Wall.*, 322.

City of New Orleans v. Gaines, 22 *How.*, 141.

The fact that the Record shows that Plaintiff was a corporation of Illinois, and Defendants non-residents of that State, does not assist the jurisdiction. Citizenship and residence are not synonymous terms.

Robertson v. Cease, 97 *U. S.*, 646.

Parker v. Overman, 18 *How.*, 137.

And in a case like this, where the Court was without jurisdiction and its judgment incapable of being enforced, and a mere impediment to a proceeding in the proper forum, a plaintiff may procure the reversal of a judgment rendered in his favor, but which is really to his detriment.

Hartman v. B. & O. F. R. R. Co., 64 *Ill.*, 24.

See also *Dred. Scott & Sandford*, 19 *How.*, 401.

II.

At the January Term, 1877, the Circuit Court heard the cause and gave judgment for Plaintiff against Defendants for $43,266.66, and, notwithstanding the fact that the interplea of Opdyke and Calhoun, claiming the attached property, was on file at the time, ordered a sale of the property to satisfy the judgment. (*Record p.* 17.) At the next term the Court tried for a second time, as far as the Record discloses, the title to the property, and found it to be in Opdyke and Calhoun. (*Record p.* 18.) This was in effect not only a reversal of a judgment of a prior term, but it denied Plaintiff all recourse on the garnishee given it by the Statute. The dismissal of the Attachment was a dismissal of the case, and this was done after judgment and at a subsequent term. This was error.

United States v. Moss, 6 *How.*, 31.

III.

But even allowing the Circuit Court jurisdiction, and, for the sake of argument, admitting that there was no error in its action as disclosed by the Record outside of the Bill of Exceptions, the Plaintiff in Error submits, that the Court erred in admitting in evidence the deed from Winslow & Wilson and their wives to Opdyke and Calhoun, (*Record pp.* 36 *to* 39,) and the deed from the same grantors to the St. Louis and Southeastern Railway Company (consolidated.) (*Record pp.* 39 *to* 43.)

Both these were acknowledged and recorded after the writ of Attachment was levied, and were entirely incompetent and irrelevant as proof of legal title in the interpleaders superior to the lien of the Attachment.

And in this proceeding no title but the legal title can be inquired of.

City Ins. Co. v. Commercial Bank, 68 *Ill.*, 348.

The only theory upon which the deeds could have been admitted in evidence was, that the equitable title could be inquired into, and in this view they might have some force as proof, when added to evidence of a prior equitable title in their grantees and notice thereof in the Plaintiff. But we have seen that the equitable title was not a subject of inquiry in this sort of a proceeding.

Upon this ground the Plaintiff, when the interpleaders had concluded their case in the Circuit Court, and the facts were established to suit them, moved the Court to find the property subject to the Attachment and not the property of the interpleaders. (*Record p.* 69). This was equivalent to asking an instruction during the progress of a jury trial, and after the Plaintiff had introduced all his evidence, to find a title to be in the defendant, and this Court will examine the Bill of Exceptions to ascertain whether the Circuit Court erred in such case.

If the evidence given by the Plaintiff is insufficient to sustain a verdict so that one based thereon would be set aside, the Court may direct a jury what verdict to render.

Herbert v. Butler, 97 *U. S.*, 319.

Pleasants v. Fant, 22 *Wall.*, 116.

And this rule is particularly applicable to the case at bar, where the question in dispute was one of title, and therefore, where the facts are clearly proved or undisputed, a question of law only.

Witherspoon v. Van Dolar, 15 *How. Pr.*, 266.

Lilienthal Tobacco, 97 *U. S.*, 270.

When the interpleaders closed their case, it appeared clearly and indisputably, that the legal title to the property in question was in Winslow & Wilson when the Attachment was levied, and it was also clearly proved, that the equitable title at that time was in the interpleaders or their grantees.

But if that equitable title could be settled in this proceeding, the Court will see that the Plaintiff had neither actual nor constructive notice of it, and had a right therefore to rely upon the recorded or legal title, which was in Winslow & Wilson.

The fact relied on to show constructive notice of this equitable title, is the open and notorious possession of the O'Fallon Railroad, which is in question, by the Southeastern Company, which it is claimed was sufficient to put the Plaintiff on inquiry, and that if it had inquired it would have discovered that while the legal title was in Winslow & Wilson, the real ownership, or equitable title, was in the Southeastern Company. There is no doubt that under ordinary circumstances, open possession of land is sufficient to charge the world with notice of all equities existing between the possessor and the owner of the legal title, but in this case the rule does not apply. The Southeastern Company, after the O'Fallon Company had executed the deed of trust under which Winslow & Wilson claimed, acquired all the title of the O'Fallon Company to the property in dispute, subject to the lien of the deed of trust, by condemnation proceedings, (*Record pp.* 19 *to* 24,) and the Plaintiff had a right to refer its possession to the title so acquired, and was not in anywise put upon inquiry by that possession.

Chadwick v. Clapp, 69 *Ill.*, 119.

Great Fall Co. v. Wooster, 15 *N. H.*, 412.

LeNeve v. LeNeve, Leadg, Cases in Eq. Part. II, *Vol.* 1, *p.* 166.

But it may be said that the Plaintiff, if it was not chargeable with constructive notice of these equities, had actual notice of them on account of the existence of the following facts. Charles W. Thomas, while he was acting as counsel of the Southeastern

Company became acquainted with the circumstances connected with the title, and knew that Winslow & Wilson only held the naked legal title, while the real ownership was in the Southeastern Company. *Record p.* 58.) Afterwards he became in various matters, including this action, counsel for the Plaintiff, (*Record p.* 64,) and was for some years one of its Directors, (*Record p.* 63,) and was acting as such when the Attachment in this case was levied. But all this does not show any actual notice of the equities of the Southeastern Company in the Plaintiff. Mr. Thomas was professionally bound not to disclose to the Plaintiff or any one else what he discovered as counsel for the Southeastern Company, and the authorities are uniform that notice to an agent who is under professional obligations not to disclose what he learns, is no notice to his principal.

Campbell v. Benjamin, 69 *Ill.*, 250.

The Distilled Spirits, 11 *Wall.*, 367.

LeNeve v. LeNeve, (and notes) *supra.*

The Plaintiff in Error therefore submits, that even had the Court below been authorized in this proceeding to inquire into the equitable title, it erred in not finding the property subject to the attachment at Plaintiff's request when the interpleaders had closed their testimony.

CHARLES W. THOMAS,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 292.

THE PEOPLE'S BANK OF BELLEVILLE,
Plaintiff in Error,

vs.

PHILO C. CALHOUN AND GEORGE OPDYKE,
Defendants in Error.

In Error to the Circuit Court of the United States, for the Seventh Circuit and Southern District of Illinois.

Statement and Brief of Argument on behalf of the Defendants in Error upon Motion to Dismiss and on the Merits.

B. H. BRISTOW,
W. S. OPDYKE,
Of Counsel for Defendants in Error.

Supreme Court of the United States,

OCTOBER TERM, 1879.

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STATEMENT.

In the year 1871, the St. Louis and Southeastern Railway Company, a corporation of each of the States of Illinois and Indiana, owning a line of railway from St. Louis *via* Belleville, Illinois, to Evansville, Indiana, undertook to construct under its charter a branch railway from Belleville to O'Fallon, Illinois, and on June 30th, 1871, instituted proceedings in the County Court of St Clair County, Illinois, to condemn the necessary right of way between Belleville and O'Fallon, and particularly the land and right of way of the former Belleville and O'Fallon R. R. Co., which had located and graded a line of railroad from Belleville to O'Fallon, the said railroad company

being unable to complete its railroad. These proceedings resulted in a condemnation of such line and right of way, July 5th, 1871, the St. Louis and Southeastern Railway Co. paying to the Belleville and O'Fallon R. R. Co. the sum of $30,000 (record, folios 35–48).

In order more effectually to secure the title to the land so condemned, under the advice of counsel, the Southeastern Ry. Co. also procured the making by the old Belleville and O'Fallon R. R. Co., of a trust deed or mortgage of all the property, dated June 13th, 1871, to Charles W. Thomas, as trustee, to secure eight bonds for $10,000 each, maturing June 20th, 1871; which deed of trust authorized the trustee, in default of payment of the said bonds, to sell and convey all the mortgaged property (fol. 75). The said Thomas, as trustee, upon default in the bonds, and under such power of sale, made a conveyance of the mortgaged property to Edward F. Winslow and James H. Wilson, bearing date July 26th, 1871 (recorded April 30th, 1875) (fol. 76).

Winslow and Wilson were partners, and as such the fiscal agents of the Southeastern Ry. Co., and they were also directors and officers of such railway company (folios 107, 117, 121). They took such conveyance for the St. Louis and Southeastern Ry. Co., and did not claim any interest in the property. Subsequently Winslow and Wilson declared this intention, and formally conveyed the said property to the St. Louis and Southeastern Ry. Co., subject to the mortgages of the railway company, to the defendants in error, Calhoun and Opdyke, mentioned hereafter (see deeds, folios 77–85, 86, 91).

The making of the said mortgage and the sale thereunder, was part of the scheme adopted to perfect title to the property, and to secure protection against certain alleged claims of former owners of the land taken for the said railway (fols. 103, 106, 109, 110, 161). Mr. Thomas, the trustee in the mortgage, had been the counsel of the old Belleville and O'Fallon Railroad Company, and was the counsel for the Southeastern Railway Company, and the said scheme was devised and carried out by him (see his letter to Alexander, fols. 102, 106, inclusive). The St. Louis and Southeastern Railway Company, in April, 1872, arranged with bankers in New York City to borrow the necessary moneys for the construction of the said branch railway, known as the O'Fallon Branch, upon the land condemned

(fols. 135, 136), and gave as security for the money so borrowed bonds, secured by a deed of trust, upon the said branch railway, which deed of trust was made to the defendants in error as trustees, being executed by the said Winslow as president. It bore date August 1st, 1872, was acknowledged August 3d, 1872, and recorded October 15th, 1872 (fols. 50-74).

From the funds so procured, the Southeastern Railway Company constructed this branch railway, and thereafter operated the same (fols. 111, 112).

The St. Louis and Southeastern Railway Company also gave a second mortgage upon all its railways, including the O'Fallon Branch, to the defendants in error, as trustees, to secure an issue of bonds amounting to $21,000 per mile of such railways, which deed of trust was dated October 1st, 1872, and, by agreement, was subject to the mortgage of August 1st, 1872 (fols. 74, 75).

On October 21st, 1874, the defendants in error, as trustees in the said mortgage, filed in the United States Circuit Court for the Southern District of Illinois a bill of complaint to foreclose the said mortgage for a default in the payment of interest, and upon the said day the said Court appointed a receiver of the mortgaged property, and put him in possession as such receiver of all said property, including the said O'Fallon Branch Railway, and the said receiver entered at once into possession, and so remained at the time of the trial of this cause below (fols. 93, 94; see also fols. 98, 102, 143, 166, 167).

Prior to December, 1873, The People's Bank of Belleville, the plaintiff in error, had become the owner of two promissory notes of the St. Louis and Southeastern Railway Company for $20,000 each, which notes were indorsed by Winslow and Wilson (fols. 16, 39, 140, 141). These notes were secured by the pledge of $80,000 of the bonds of the company secured by the mortgage under which the receiver was appointed as aforesaid (fols. 139, 140).

In December, 1875, the plaintiff in error petitioned the aforesaid United States Circuit Court in the aforesaid foreclosure suit for leave to bring suit against the railway company upon the said notes (fol. 100), and in February, 1876, also petitioned the said Court in said suit for leave to sell the said bonds held as collateral to the said notes (fol. 98, 99).

On the 23d day of March, 1876, the said Branch Railway, being thus in possession of the receiver of the said Circuit

Court, the plaintiff in error began, by attachment to the April Term, 1876, of the Circuit Court of the County of St. Clair, Illinois, an action upon the $40,000 of notes aforesaid against Winslow and Wilson as non-residents (fols. 5-16); the said Winslow resided at Cedar Rapids, Iowa, and the said Wilson at Wilmington, Delaware (fol. 117).

Under this attachment the Sheriff levied upon the aforesaid Branch Railway from Belleville to O'Fallon as the property of Winslow and Wilson (fol. 110).

On the 29th day of March, 1876, upon the application of the defendants in error, Calhoun and Opdyke, as trustees, the aforesaid Circuit Court of the United States for the Southern District of Illinois issued a restraining order against the plaintiff in error and the Sheriff of St. Clair County, to whom the plaintiff in error had procured its attachment to be issued, against further prosecuting the attachment in the State Court, and against interfering with the possession of the receiver then in possession of such Branch Railway (fol. 102).

On the 27th day of April, 1876, the action so brought by the plaintiff in error in the State Court was, by consent of the parties, removed to the United States Circuit Court for the Southern District of Illinois (petition and bond waived) (fol. 19); and an order to that effect was entered in the State Court (fol. 20), and the record was filed in the said United States Circuit Court May 23d, 1876 (fols. 4 and 5).

On the 15th day of March, 1877, the defendants in error, as trustees, &c., filed an interpleader in the said U. S. Circuit Court, entitled in the said suit of the People's Bank of Belleville against Winslow and Wilson, claiming that the said Branch Railway from Belleville to O'Fallon was their property, and not the property of the said Winslow and Wilson (fols. 27, 28). To this interpleader the plaintiff in error filed an answer on March 16, 1877 (fols. 29, 30).

On the 10th day of April, 1877, a trial was had in the said United States Circuit Court (as of the January Term) as to the issues pending in the said suit of the plaintiff in error against Winslow and Wilson, and, by oral consent, the issue joined was tried by the Court, a jury being waived, and the Court, having heard evidence and argument of counsel, found the issue for the plaintiff, and assessed its damages in the sum of $43,266.66. It was further ordered that a special execution issue requiring the

Marshal to make sale of the property attached, namely, the said railway from Belleville to O'Fallon (fols. 32, 33).

It will be noticed that the defendants in error, Calhoun and Opdyke, were not parties to this contention, and that no hearing or adjudication was had at this time upon the interpleader filed by them.

On September 4th, 1877 (as of the June Term), a trial was had in the said United States Circuit Court upon the interpleader of the defendants in error, Calhoun and Opdyke, and all questions arising on the said interpleader, and the answer thereto, were submitted to the Court, a jury being waived by oral consent only. And thereupon it was found by the Court that the property levied upon by the attachment was the property of the interpleaders, and not the property of Winslow and Wilson, (fol. 34.)

Thereupon a writ of error was sued out by the People's Bank of Belleville to this Court (fols 1, 2), and a bill of exceptions allowed (fol. 167).

The defendants in error filed a motion in this Court, on the 8th day of March, of the present term, to dismiss the writ of error, upon the ground that the issues below having been submitted to and tried by the Court without a jury, and no stipulation in writing waiving a jury having been filed, the judgment was not reviewable by this Court.

This Court, on the 15th day of March of the present term, ordered that the motion to dismiss, be postponed until the case came up to be heard on its merits.

The defendants in error, Calhoun and Opdyke, present the following points, both as to the motion to dismiss and as to the cause upon its merits.

POINTS.

I.

The objection to the jurisdiction of the Court below is without foundation.

(1) The suit of the plaintiff in error was a proceeding *in rem* against certain railway lands, which lands were, at the time of the institution of the proceedings, in the possession of the United States Circuit Court for the Southern District of Illinois, through a receiver appointed in a suit to foreclose a mortgage upon the said railway lands. It scarcely needs authority to show that where the *res* constituting the subject of a litigation *in rem* is in the possession of any court, that court has full jurisdiction of all questions affecting the *res*, and, in fact, ousts all other courts of jurisdiction of such proceedings.

(*a*) The Court first getting possession of the subject of a litigation, has exclusive jurisdiction of such subject.

Watson vs. Jones, 13 Wall., 715.
Buck vs. Colbath, 3 Wall., 337.
Freeman vs. Howe, 24 How., 450.
Wiswall vs. Sampson, 14 How., 52.
Taylor vs. Caryl, 20 How., 583.
Hogan vs. Lucas, 10 Peters, 400.

(*b*) Jurisdiction having thus attached to the *res* of the litigation, the Court having possession of the property, has power to decide all controversies and all equities relating to the administration of the property.

Peck vs. Jenness, 7 How., 612.
Freeman vs. Howe, 24 How., 451.
Buck vs. Colbath, 3 Wall., 334.
Riggs vs. Johnson Co., 6 Wall., 166.

A Federal Court thus, frequently, through possession of the *res*, is enabled and compelled to decide controversies relating to persons, who, otherwise could not, by reason of their citizenship, become parties to the litigation, but who

come in and submit themselves to the decision of the court in the administration of the property.

Freeman vs. Howe, 24 How., 451, 460.
Buck vs. Colbath, 3 Wall., 334, 345.

In *Freeman vs. Howe* Judge Nelson says: "Another mis-"apprehension under which the counsel for the defendant "in error labors, and into which the Court below fell, was "in respect to the appropriate remedy of the plaintiffs in "the replevin suit for the grievance complained of. It was "supposed that they were utterly remediless in the Federal "Courts, inasmuch as both parties were citizens of Massa-"chusetts. But those familiar with the practice of the "Federal Courts have found no difficulty in applying a "remedy, and one much more effectual than the replevin "suit, and more consistent with the order and harmony of "judicial proceedings, as may be seen by reference to the "following cases: *Pennock vs. Coe, 23 How., 117; Gue vs. "Tidewater Canal Co., 24 How., 257; Clarke vs. Mathew-"son, 12 Peters., 164; Dunn vs. Clarke, 8 Peters., 1; Logan "vs. Patrick, 5 Cranch., 288.*"

The opinion goes on to show that any suit or proceeding ancillary, dependent or supplemental to an original suit out of which it had arisen, is maintained without reference to the citizenship or residence of the parties.

In *Buck v. Colbath* it was held: "That persons interested "in the possession of the property in the custody of the "Court, may by petition make themselves so far parties to "the proceedings as to have their interest protected, al-"though the persons representing adverse interests in such "case do not possess the qualification of citizenship neces-"sary to enable them to sue each other in the Federal "Courts."

It was further said that the only limitation to the rule that a Court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, is that is confined in its operation to the parties before the Court, or those who may come before the Court and have a hearing on the issue so to be decided.

(*c*) Any attempt to interfere with the possession of the receiver, appointed by a court in any proceeding *in rem*, or

in any foreclosure suit, would be a contempt of the court. The only allowable mode of litigating adverse claims of title to property, thus in the possession of a receiver, is by obtaining leave of the court to bring suit against its officer, or by coming into court to be examined *pro interesse suo.*

Wiswall vs. Sampson, 14 How. 52, 65.
2 Daniels Ch. Prac., (Third Amer. Ed.) 1073, 1076.
High on Receivers, §§ 139, 150.

The proceedings below by the plaintiff in error so far as the defendants in error are concerned, may properly be treated as such an intervention *pro interesse suo.*

This is well illustrated in the case of *U. S. vs. New Orleans R. R.* (12 Wall., 364). It was objected in that case, on the argument in this Court, that the matter came up without pleadings or any substitute therefor. This Court held that a court of equity in a suit for the foreclosure of a mortgage, clearly has cognizance of all questions relating to priority of lien on the property in litigation, and that the mode in which the jurisdiction should be exercised is more a matter of form than substance. It was said that ordinarily a reference to a master before the final decree would be the formal method to pursue, but that questions of priority in such a case may be submitted to the Court by agreement, without formal pleadings, even after decree of foreclosure.

(2) It abundantly appears by the record, that the *res* in this case was in the possession of the U. S. Circuit Court for the Southern District of Illinois, in the suit brought by the defendants in error, Calhoun and Opdyke, as trustees in the mortgage given by the Southeastern Railway Company.

It appears, at folio 94 of the record, that a foreclosure suit was instituted in the said court by the said defendants in error, October 21, 1874; that on the same day the court appointed a receiver of the mortgaged property pending the litigation; put him into the possession of such property, including the railway affected by the attachment of the plaintiff in error, and that the receiver remained in possession at the time of the trial.

It further appears, at folio 100, that the plaintiff in error, December 10th, 1875, petitioned the said Circuit Court, in the said

foreclosure suit, for leave to sue the railway company, and at folio 98, that the plaintiff in error further petitioned the said court, in said suit, for leave to sell the collateral securities attached to the promissory notes, which are the foundation of its original cause of action.

It further appears, at folio 102, that the said Circuit Court, in the said foreclosure suit, made a restraining order March 29th, 1876, against the plaintiff in error and the Sheriff of St. Clair County, restraining them from further prosecuting the attachment suit in the State Court.

It further appears in the testimony, at folios 112, 143, 166, 167, that the railway affected by the attachment was in the possession of the receiver, and that the plaintiff in error and its counsel well knew such to be the fact.

(3) It is not necessary that the facts conferring jurisdiction on the Circuit Court below should appear in the pleadings in the cause, but it is sufficient that this Court, from inspection of the record, can determine the fact that sufficient ground of jurisdiction existed.

Briges vs. Sperry, 95 U. S., 403.
Railway Co. vs. Rouney, 22 Wall., 326.
Approved in Robertson vs. Cease, 97 U. S., 648.

II.

None of the errors assigned by the plaintiff in error, other than that as to the jurisdiction, can be reviewed in this Court, the case having been tried before the Court without a jury, and no written stipulation waiving a jury having been made and filed.

(1) No written stipulation having been made and filed, the parties have lost the right to have reviewed in this Court any alleged errors in the rulings of the Court in the course of the trial.

(Upon this point we present for convenience a summary of

the brief filed upon the motion to dismiss, referring to that brief for a fuller discussion of the question.)

(*a*) Prior to the Act of March 3d, 1865, it was repeatedly held by this Court that parties might waive the right of trial by jury, and that judgment by the Court in such cases would be valid.

Burr vs. Des Moines Co., 1 Wall., 99.
Suydam vs. Williamson, 20 How., 427.

(*b*) But although the judgment of the Court in such cases was held valid, it was also held by this Court that such judgment would not be reviewed by this Court, and that the appellate power of this Court did not extend to such cases; and that the Circuit Judge in such cases was to be considered as sitting merely as an arbitrator.

Kelsey vs. Forsyth, 21 How., 85.
Graham vs. Bayne, 18 How., 60.

(*c*) The Act of March 3d, 1865, as reproduced in two sections of the Revised Statutes is as follows:

"SEC. 649. Issues of fact in civil cases in any Circuit "Court may be tried and determined by the Court, without "the intervention of a jury, whenever the parties, or their "attorneys of record, file with the clerk a stipulation in "writing waiving a jury. The finding of the Court upon "the facts, which may be either general or special, shall "have the same effect as the verdict of a jury."

"SEC. 700. When an issue of fact in any civil cause in a "Circuit Court is tried and determined by the Court without "out the intervention of a jury, according to section six "hundred and forty-nine, the rulings of the Court in the "progress of the trial of the cause, if excepted to at the "time, and duly presented by a bill of exceptions, may be "reviewed by the Supreme Court, upon a writ of error, or "upon appeal; and when the finding is special, the review "may extend to the determination of the sufficiency of the "facts found to support the judgment.

(*d*) Neither the Act of 1865 in its original form, nor as subdivided in the Revised Statutes, authorizes this Court to review *all* cases submitted to and tried by the Court without the intervention of a jury, *but only* cases where-

in "the parties or their attorneys of record file with the "clerk a stipulation in writing waiving a jury;" and such written waiver must appear by the record to have been given and filed.

Kearney vs. Case, 12 Wall. 275.
Flanders vs. Tweed, 9 Wall. 428.

(2) Even if such a stipulation had been made and filed, this Court could review only errors arising upon the pleadings, or upon rulings made in the course of the trial,—there being no special findings.

In *Norris vs. Jackson* (9 Wall., 125), it was held, that where the case had been tried below without a jury, under the Act of March 3d, 1865, and there were no special findings, the judgment must be affirmed, unless the bill of exceptions presented some erroneous ruling of the Court *in the progress of the trial*, and that the bill of exceptions, while professing to detail all the evidence, was no special finding of the facts. To the same effect is the case of *Flanders vs. Tweed* (*9 Wall, 425*).

In the case of *Coddington vs. Richardson* (*10 Wall., 516*), it was again decided that in a case tried before the court without a jury, under the Act of March 3d, 1865, this court would review only questions of law arising upon the pleadings, or upon the rulings of the court in the progress of the trial. In *Miller vs. Life Ins. Co.* (*12 Wall., 285, 297*), it was held that if the finding of the court below, in a case tried without a jury, was general, it was final and conclusive between the parties, unless the Court which tried the case should grant a new trial, or the judgment should be reversed in the appellate court *for some erroneous ruling made in the progress of the trial, which is duly presented by bill of exceptions.*

These cases are approved in the case of *Ins. Co. vs. Folsom* (*18 Wall., 231, 248*). The court there say that where a jury is waived under the Act of March 3d, 1865, and where the finding is general, the parties are concluded by the determination of the Court, *except in cases where exceptions are taken to the rulings of the court made in the progress of the trial. Such rulings, if duly presented by bill of exceptions may be reviewed here, even though the finding is general, but the finding of the Court, if general, cannot be reviewed in this Court by bill of exceptions or any other manner.*

None of the errors assigned here arise upon the pleadings other than perhaps the first and second assignments of error based upon the jurisdiction.

The third, fourth, fifth, sixth, seventh and eighth assignments are founded wholly upon the bill of exceptions.

(3) There is, therefore, no foundation for the claim made by the counsel for the plaintiff in error, that this Court can review the errors enumerated by him.

In fact, all the errors alleged, other than that as to the jurisdiction, are brought up only by the bill of exceptions. This Court will not review the determination of the court in a case tried without a jury, except as to errors committed "by rulings in the course of the trial;" and, under the rule laid down in *Kearney vs. Case*, such rulings are not reviewable in this case.

III.

Independently of either of the points already stated, the writ of error herein should be dismissed.

The appellate jurisdiction of this court can be exercised only in the cases brought here in the manner authorized by law. In an equity case, the review by this Court can be had only by appeal. In a case at law there can be no review, unless a writ of error has been allowed in a case where the statute authorizes it. Neither at law nor in equity can this court review a judgment for an amount less than the amount named in the statute.

No statute authorizes the bringing of this case up for review upon any question presented by the record.

This, being an action at law, could be brought here for review by writ of error only; not by appeal. Of course, no such writ could be allowed until a final judgment had been rendered. Inasmuch as the claim of the plaintiff below was contested by proper pleadings, no judgment by default could have been rendered; the Court below could render judgment only upon a trial

of the issue joined. The parties had the right to have the case tried in such manner, as to preserve to themselves, the right of review by this Court on writ of error; but in order to do so, they should have exercised their right of trial by jury, or waiving that, they should have filed "with the Clerk a stipulation in writing," as required by the Act of 1865. There is no other mode of bringing a suit at law to this Court for review.

Having failed to put the case in either of the conditions in which the statute authorizes this Court to review it, the writ of error should be dismissed. In prosecuting the case to judgment, plaintiff neglected to adopt the means necessary to preserve the right of review by this Court. In such a case this Court will not look with favor upon a contention which would enable a party to violate faith with his adversary and harass him with further litigation about a matter which has been the subject of full and fair adjudication by a Court to which he had voluntarily submitted his case.

To adopt the construction of the statute contended for by counsel for plaintiff in error would be giving it a narrow and technical meaning not consistent with the exposition of it by this Court in the cases cited and the obvious effect of such a construction in this case, would be to allow a party to take advantage of his own wrong—to profit by his own laches—and to trifle with courts of justice.

IV.

The fourth assignment of error is without foundation.

The judgment or order entered by the Circuit Court below April 10th, 1877, in the January Term, did not preclude the court from making the judgment rendered September 4th, 1877, in the June Term, against the plaintiff in error and in favor of the defendants in error, Calhoun and Opdyke. The only issue tried at the January Term was the issue between the People's Bank of Belleville, plaintiff, and Winslow and Wilson, defendants (fol. 32); and the order directing execution against the property attached was not and could not have been anything more than an order to sell the interest of Winslow and Wilson in such property (fol. 33). Calhoun and Opdyke, as trustees, were not parties to that proceeding. They are not mentioned

in the title or body of the judgment, and the judgment does not purport to affect them. Further, the cause was in no position for hearing as to the intervenors at that time, and did not reach a position for hearing as to them until the June Term. The answer of the plaintiff in error to the intervening petition was filed March 16th, 1877, in the January Term of that year.

The hearing upon the interpleader came on for the first time September 4th, 1877, in the June term, and was heard then without objection. The plaintiff in error, by its counsel, submitted to the court all questions arising upon the interpleader, and the answer thereto (fol. 34.) This was the first and only adjudication as to the intervening petition. The former order decided merely that as against Winslow and Wilson's interest, if any, the bank could enforce the judgment against the property attached.

V.

The whole contention on behalf of the plaintiff in error is without equity, and does not entitle it to the favorable consideration of this Court.

The plaintiff in error employs to prosecute its claim upon the notes of the Southeastern Railway Company, indorsed by Winslow and Wilson, and to enforce the same against the O'Fallon Branch Railway *as the property of Winslow and Wilson*, the very same counsel who had formerly acted *for the Southeastern Railway Company* in the proceedings to acquire title *to such Branch Railway* for the Southeastern Railway Company. The counsel so employed well knew that the equitable, if not the legal, title to the said Branch Railway was in the Southeastern Railway Company, and that Winslow and Wilson had no real interest therein or title thereto. This knowledge of the counsel was the knowledge of the plaintiff in error.

Both the plaintiff in error and its counsel well knew that the Southeastern Railway Company had been in possession of the said Branch Railway, and operated it prior to the appointment of a receiver, October 21st, 1874. They knew, also, that after October 21st, 1874, the said Branch Railway was in the posses-

sion of and was operated by the receiver of the United States Circuit Court for the Southern District of Illinois.

They make two separate applications to the Federal Court, in December, 1875, and February, 1876, for leave to prosecute a suit upon the notes against the railway company, and for leave to sell the collateral attached to the said notes.

Nevertheless, in March, 1876, they attempt to attach and sell the property, thus in the possession of the Federal Court, by proceedings in the State Court. Being met by the restraining order issued by the U. S. Circuit Court, they consent to transfer their attachment suit to the Federal Court, and an order of the State Court to that effect was entered. If the Federal Court did not thus take jurisdiction of the litigation, the suit was thereby abated, and is not now pending in any Court.

They go to trial upon the merits before the Federal Court, as an arbitrator waiving a jury, and the question thus arising upon an intervening claim as to the property, which was *in gremio legis*, was decided by the Court against the claim of the plaintiff in error.

The plaintiff in error, and its counsel, being thus defeated in their attempt to secure for the plaintiff in error—the counsel's new client—property, the title of which such counsel had formerly been employed to make in the Southeastern Railway Co.—his old client; the new client, the plaintiff in error, now asks this Court, not to dismiss its writ of error in a case where this Court has no power to review the judgment below, but to retain the case long enough to reverse the same for an alleged want of jurisdiction, in that the record does not expressly show that the parties were citizens of different States, although it does show that they are residents of different States and that the subject of the suit was in the possession of the Federal Court below.

Finally.

We submit that this Court, must either dismiss the ~~error~~ writ of error, as not presenting any question for review in any manner authorized by law, or if the Court looks into the question of jurisdiction, must uphold the jurisdiction of the Court below, and affirm the judgment.

Even if this were not so, and if the jurisdiction does at present not sufficiently appear by the record, the practice of this Court will permit the case to be sent back to allow the proper amendments to be made to cause the jurisdiction to appear.

Robertson vs. Cease, 97 U. S., 646.
Morgan Exrs. vs. Gay, 19 Wall., 81.

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